Supreme Court, U.S.
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No.

IN THE
Supreme Court of The United States

SONJA N. COLBERT,
Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
CALIFORNIA DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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139 pp

STATEMENT UNDERPINNING THIS CASE

This is a complaint alleging Sexual Harassment, Wrongful Termination, Infliction of Emotional Distress, Threats of Violence, and Failure to Re-Employ this "work related Permanently Disabled Petitioner."

QUESTIONS PRESENTED

1. The Circuit and District court failed to mention any of Petitioners substantial and timely filed evidence in opposition to summary judgment, is plain legal Error?

2. The Magistrate "alleged independent allegations," not proffered by either party in Respondents favor, wherein Respondents failed to proffer any evidence whatsoever on & Petitioner proffered evidence to the contrary, then the Court "admits" looking outside the pleadings to grant summary judgment, is Erroneous?

3. Petitioner's objections to the Magistrates "Findings and Recommendations, regarding summary judgment & Request for Reconsideration" weren't ruled on, based on *"unilateral ex parte request* of Respondents" is Error?

4. Each case the Courts referenced below required a trial, but denied in this matter, & The Court-struck Petitioners reply *En Banc* brief opposing summary judgment, Errors?

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OPINIONS / ORDERS BELOW

The Order of the Court of Appeals denying the Petition for Rehearing en banc or by panel was denied on February 13, 2003 and entered on February 13, 2003 as was the motion to stay the mandate and the request for publication. This is reprinted in Appendix **A.**

The Ninth Circuit Panel's Memorandum is unpublished and reprinted in Appendix **B.**

The Ninth Circuit Panel's Order on Respondents to file a response to Petitioners Rehearing request is reprinted in Appendix **C.**

The Ninth Circuit Panel's clerks instruction striking Petitioners Reply to Respondents response is reprinted in Appendix **D.**

The Order of the District Court granting Respondents summary judgment is reprinted in Appendix **E.**

The Magistrate Judge's Findings and Recommendations to the District Court is reprinted in Appendix **F.**

JURISDICTION

The Order denying the timely filed Petition for Rehearing of the Court of Appeals in this case was filed on February 13, 2003. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if (mailed U.S.P.S. first class)postmarked by May 14, 2003.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to: 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

This case involves application of the following statutes and rules. The claims at issue in the Circuit and District Court are based upon federal question jurisdiction. These claims are based on Title VII 2000e-2, 2000e-5 (and g) and title 42 United States Code and claims arising under Title VII of the civil rights act of 1964 for employment discrimination. The denial of a federal right to a jury trial in a civil matter (Seventh Amendment), arises under the Constitution and laws of the United States; This case meets the case and controversy requirements of Article III, section 2, of the United States Constitution. This Writ of Certiorari seeks to overturn a final order of the Eastern District Court of California which was sustained by the Court of Appeals for the Ninth Circuit. The statutes are lengthy, Please see Appendix.

STATEMENT OF THE CASE

The subject controversy arises by virtue of Petitioner, a state employee with dual agency employment for the California Department of Mental Health and the California Department of Corrections, at California Medical Facility Vacaville California State Prison.

During Petitioners tenure, she was singled out and targeted by an inmate for rape and murder. In this matter, its was extreme targeted attempts, isolated attacks that Petitioner experienced from an inmate of repeated and explicit sexual harassment, and was threatened with death and serious bodily harm from the same inmate who was convicted of

murdering his rape victim.

It was only after Petitioner repeatedly sought protection from the inmate by her employer and was refused she became sick. Petitioner, in a desperate attempt to obtain protection copied salient parts of regulations and delivered the same to her supervisors to support her request for protection. One such supervisor Senior MTA Andres, instead of assisting Petitioner, simply stated flatly that she was not being harassed by the inmate.

In the instant case the harasser was motivated by sexual desire: As exhibits provided to the Courts by Petitioner, the inmate/harasser had minions willing to commit crimes on his behalf. The inmate sent messages to Petitioner through other inmates that unless she capitulated to his demands for sexual satisfaction she would be killed, ("shanked"), wrote sexually explicit letters, the inmate/harasser and two other inmates attempted a physical attack against Petitioner and she narrowly escaped with the aid of co-male employee, "MTA Noces." On a 90-minute tape recording provided to the lower court and Circuit court by the EEOC of employees giving oral testimony on behalf of Petitioner, the employer's duly authorized Agent "Antonio Aguilar," Stated that the harassment experienced by Colbert, "Comes with the job."

In her complaint Petitioner alleged that Respondents were duty bound by established policies to take steps to protect Petitioner and prevent such harassment and threats. Petitioner alleged that she was actually and proximately

harmed by Respondents failures to comply with existing policies. Petitioner also sought relief for wrongful termination after "blowing the whistle" as to Respondents omissions. Other inmates informed her that he, "Inmate Glass" was making offers to fellow inmates to kill Petitioner. Glasses fellow inmates reported to Petitioner that shanks were hidden and available.

Petitioner, remains on permanent Social Security Disability due the events transpiring in the case. Early on Petitioner was placed on disability. Eventually she was seen by a physician employed by the State of California (employed by Respondents). She was ultimately placed on permanent Social Security Disability. Respondents, obviously continuing in its denial of the actual facts, has the temerity to state under its "facts" that Petitioner was "AWOL" and hence terminated from her employment.

Neither Court nor Respondents, mentioned attached to Petitioners Opposition to summary judgment, that Petitioners Medical Facility submitted to Respondents and Petitioner, (26) extensive Doctors letters and medical reports from May 1995 to May 1999 to accommodate Petitioner to return to work under any such conditions. Respondents refused to respond to the Primary care provider or anyone at the medical facility even though Petitioner signed a release. May 1999 The Respondents terminated Petitioner as though she and her Doctors refused to communicate, as though Petitioner had resigned. Nevertheless, Petitioner was paid workers compensation for some of the

work related time off work for her traumatic experience, this instant action followed.

ARGUMENT AMPLIFYING REASONS FOR WRIT. In the District Court Petitioner, filed a claim for sexual harassment, wrongful termination, infliction of emotional distress, threats of violence, and failure to re-employ this "work-related" permanently disabled Petitioner. The Circuit Court sanctioned such a departure by the lower court, not applied any case decisions of the Supreme Court, other Circuits, or it's own Circuit *"to this case,"* which Public Policy requires, as to call for an exercise of the supervisory powers of the United States Supreme Court.

Respondents motioned the District Court for summary judgment. Each material alleged fact of Respondents was controverted. Many of the business records were provided by Respondents and the like provided by Respondents which demonstrated that the alleged facts recited in movant's motion were unsupported by their own business record entries.

Respondents joint motion for summary judgment alleged that, "Petitioners complaint failed to raise a triable issue of material fact" regarding the above claims. Respondents failed to utilize proper procedure in attacking the pleadings: Respondents did not demurrer to the complaint on the above basis, did not move to strike the complaint or any part thereof on the above basis, did not move for judgment on the pleadings, nor did Respondents move for a more definite statement of the pleadings. Respondents conceded that they

waived their rights regarding the above procedures. See Respondents Reply to Petitioners opposition to their motion for summary judgment pg 3-ln 26, 27 and pg 4-ln 1 attached to their reply to their motion.

Respondents did not seek certain findings and recommendations by the court in its motion for summary judgment, nor did Respondents file a motion for summary adjudication of issues. The court, however, *sua sponte*, gratuitously made such findings in its issued Findings and Recommendations shown without court mention of Petitioners timely filed evidence in opposition.

The Magistrate did not address the issue presented by Respondents motion for summary judgment. Many such facts which were ignored by the court were established by Respondents own business records and admissions made in another proceeding. Petitioner asserts that the motion for summary judgment and the timely filed papers in opposition thereto fail to provide a basis upon which the court could make such calculated erroneous findings.

Summary of argument. The magistrate court did not mention in its findings and recommendations that Petitioner filed a substantial and much more extensive brief that Respondents moving papers with a separate statement of 81 material facts in opposition, 23 exhibits, witness affidavits, medical reports, 26-doctors letters written to respondents, policies, business records, 500+ pages of the EEOC case file, a 90 minuet tape of the EEOC Fact Finding conference of employees

giving oral testimony on Petitioners behalf, State report of Permanent Social Security Disability, and with over 169 documents as attachments, which constitutes error. The Magistrates findings are based solely on the Respondents allegations in their motion for summary judgment and matters outside the complaint as though Petitioner filed no opposition thereto. In addition; Petitioner timely filed Objections to the Magistrates judges Findings and Recommendation regarding "Summary Judgment," (still not ruled upon.)

On or about December 04, 2000, Respondents Deputy Attorney General counsel, Lisa A. Williams, unilaterally contacted the Court's clerk, stating that she was just "assigned to the case," Respondents were not "ready" to comply with the court's Pre-trial scheduling order and requested that the order be vacated so that the sanctions did not attach to Respondents. See Appendix District Court Docket Sheet.

The same day the court vacated its Pre-trial scheduling order. Petitioner, after complying with the order, by filing her Separate Pre-trial Statement of over 1700 pages of evidence for trail, filed on December 05th 2000, received notice that the same was vacated on December 7, 2000 (the day after compliance was due). Compliance was due December 6, 2000. See Appendix District Court Docket Sheet.

Petitioner filed a Separate Pre-trial Statement because Respondents four Attorneys of record failed and refused to communicate with Petitioner in preparation of a Joint Pre-trail Statement. See

Appendix District Court Docket Sheet.

On or about December 11, 2000 Petitioner timely filed her "Request for Reconsideration of the District Courts New Order," vacating its pretrial scheduling order. See Appendix District Court Docket Sheet.

In Petitioners request for Reconsideration she asserted that the District Court has failed to apply Fed Rule 72-303(f) Standard of Review. The Proper standard is the "clearly erroneous or contrary to law" standard as set forth in 28 U.S. 636 (b)(1)(A), Fed Rule Civ. P. 72(a) states, "The District Court judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law." Petitioner contended that the vacation of the Pre-trial Scheduling order unfairly punished her diligence and rewarded Respondents' dilatory conduct. By granting Respondents counsel's ex parte and unilateral request, the court relieved Respondents of the sever sanction for non-compliance.

Petitioner sought reconsideration based upon: (A) it is unseemly for the Magistrate Court to vacate its order, requiring sanctions against Respondents failure to comply therewith base upon a unilateral and ex parte communication with the court. Such combined conduct has the specter of collusion; and appearance that the District Court is duty bound to avoid; (B) Vacating its order erased or eroded Petitioners diligently an hard earned advantages for trial and/or in other proceedings; (C)

It allows Respondents to use evidence (which would be inadmissible under that Pre-trial Scheduling order) in its motions for summary judgment!

The lower court did not rule on Petitioners Request for Reconsideration notwithstanding the fact it was filed 39 days prior to the granting of Respondents Motion for Summary Judgment, (Granted 01-19-2001). Further, had the Magistrate imposed the sanctions contained in its Pre-trial Scheduling order, Respondents would not have been allowed to proffer any defense evidence at trial and summary judgment moot for lack of evidence! Please note that by its own terms, the Magistrates order required any objection to the Pre-trial Scheduling order be timely made. Respondents ex parte request to vacate the same was not subject to a noticed motion allowing argument from Petitioner prior to vacation or any particularized showing of good cause timely made; referenced in that order.

The Magistrates actions in this case cannot be sustained. Please see *Marshall v. Gates, 39 F.3d 1046 (9th Cir.1994).* A motion for summary judgment cannot be granted when the moving party violated a local rule, with ex parte communications, and see *Henry v. Cell Industries, Inc., 983 F. 2d 943, 950 (9th Cir.1993);* also see, *Simpson v. Lear Astronics Corp., 77 F. 3d 1170 (9th Cir. 1996),* and a motion for summary judgment cannot be granted when other motions are pending, and substantially opposed.

On a motion for summary judgment, the moving party must establish that no genuine issue of material facts exist and that such party is

entitled to judgment as a matter of law. An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the opposing party, *Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986.)* And see Federal Rules of Civil Procedure Rule 56. The evidence of the non-movant is to be believed and considered, and all justifiable inferences are to be drawn in his [or her] favor, Anderson, *supra, 477 U.S.242, 255 (1986).* Summary judgment is proper only if there is "no genuine issue as to any material fact." Id. At 258. A "genuine issue" exists, precluding summary judgment where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. At 248 "[A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial" Id. at 249 quoting (*First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968).* At trial, as in her opposition to summary judgment, Petitioner would have established that Respondents' either ratified or acquiesced in the harassment by failing to take reasonable corrective action when it knew or should have known of the conduct. *Folkerson v. Circus Enterprises, Inc. 107 F.3d 754, 755 (9th Cir. 1997)*

Petitioner also sought relief for wrongful termination after she blew the whistle regarding Respondents omissions. Petitioner has a meritorious claim under *Fuller v. City of Oakland 47 F. 3d 1527 (9th Cir. 1995)* and *Ellison v. Brady 924 F.2d 872 (9th Cir. 1991).* She also has a meritorious claim for wrongful termination under *Garibaldi v.*

Lucky Food Stores, Inc.726 F.2d 1367 (9th Cir.1984),Harper v. San Diego Transit Corp. 764 F.2d 663 (9th Cir. 1985) and City of Moorpark v. Superior Court 18 Cal.4th 1143. It was therefore error for the court to determine these issues which denied Petitioner her Seventh Amendment rights.

One of the primary issues presented in this writ is whether or not Petitioner is entitled to a trial by jury consistent with her Seventh Amendment rights. In the District Court, Respondents brought a motion for summary judgement on only one ground: "...that the *complaint* fails to raise a triable issue of material fact..."[emphasis added.]

The Magistrate Court made independent findings and recommendations based upon "matters outside of the complaint and records not proffered by either side, and found such against Petitioner." The District Court ignored, did not consider Petitioners substantial oppositional brief and documents submitted in support in reaching its conclusion.

Respondents alleged "facts" were appropriately contested by Petitioner and were not facts at all as demonstrated by Respondents own official records. Moreover, Petitioner controverted Respondents "facts with approximately 1700 pages of documentation which had been lodged with the District Court on December 05, 2000, of a separate pre-trial statement, pursuant to the order requiring the parties to lodge evidence to be used at trial with that court by December 06, 2000.

[Petitioner submits that, whether the factual

allegations of either side are true or not, it is error for the court to "in writing create allegations on its own," in it's findings and recommendations, not alleged by Respondents, then the court signs it's signature to the recommendations and substitute it's findings for that of a jury which information was not submitted to the court and were not alleged in anyway by Respondents or Petitioner, which constitutes bias intentional error.]

On or about January 19, 2001 the Magistrate Court issues its Findings and Recommendations and recommended to the district court that summary judgment should be granted. **See Appendix F.**

On or about January 26, 2001 Petitioner filed her objections to the Magistrates findings and recommendation in regards to summary judgement. **See Appendix G.** The Magistrate never ruled upon or District court. In Petitioners objection to the Magistrate Judges findings & recommendations, "Petitioner demonstrates as to such findings, line by line," that substantial evidence was presented by Petitioner in her opposition to Respondents motion for summary judgment such that a jury could go either way on the facts. In Respondents opposition, they "fail to controvert the sufficiency of Petitioners evidence." Such factual determinations should have been left to a jury to decide, and Petitioners oppositional evidence would have been considered.

On or about February 16, 2001 the same Magistrate struck from the record Petitioners reply to Respondents opposition brief to Petitioners opposition to the Magistrates findings and

recommendations regarding summary judgement.

On or about February 22, 2001 Petitioner filed her objection to Magistrate Judge striking document, request for reconsideration by the District Court [Rule 72] and Petitioners application for retention of file by the District Judge [Rule 72]. The court stated that Petitioners reply was only stricken because the proof of service had been filed (one day) after the reply was filed. Astonishingly the court did not strike Respondents response and declaration of two documents they filed when their proof of service on two other occasions in this case, was filed (12) twelve days later both times!

On or about September 21, 2001the District Court states he conducted a de "novo review,"of the file and based upon that review the court "finds the magistrate judges findings and recommendations to grant defendant motion for summary judgment is supported by [The record] and by [the magistrate judges analysis]." And no mention of being supported by Respondents moving papers. **See Appendix E.**

On or about September 28, 2001 Petitioner filed her Notice of Appeal to the Ninth Circuit Court of Appeals and appealed the District courts grant of summary judgment. On or about September 18, 2002 before HUG, O'SCANNLAIN, and TASHIMA, Circuit Judges, issued it's Memorandum and Affirmed the lower courts grant of summary judgment. **See Appendix B.**

The Ninth Circuit Court found a single and different bases for the grant of defendants motion for summary judgment and not the findings and

recommendations found by the Magistrate court as entered by the District Court.

The Ninth Circuit Court States, "Colbert failed to raise a genuine issue of material fact concerning whether defendants failed to take immediate and appropriate corrective action in response to Colbert's complaints of sexual harassment," then said, *"See Little v. Windermere Relocation, Inc., 2002 WL 84237, at *6 (9th Cir. Jan. 23, 2002) (as amended)."* The Ninth Circuit Court committed reversible error by not addressing Petitioners request to require the lower court to rule on Petitioner pending "Request for Reconsideration of the District Court's order," which vacated its pretrial Scheduling order,"or the pending "Objection to the Magistrates Judges findings and Recommendations regarding summary judgment," presented in Petitioners opening brief.

The Circuit Court did not mention in its order Petitioners remaining causes of action for: *Wrongful termination, Infliction of Emotional Distress, Threats of Violence, and Failure to Re-Employ Petitioner.*

On or about September 30, 2002 and again on October 04, 2002 Petitioner filed a Petition for Rehearing *En Banc*, or by panel. Petitioner briefed the cited case from the three panel court referenced in its order of: *Little v. Windermere Relocation, Inc., 2002 WL 84237, at *6 (9th Cir. Jan. 23, 2002) (as amended).* Petitioner sought a written published opinion and re-hearing en banc on the basis that it misapplied Little v. Windermere and that the panel court created a new bases for the grant of Respondents motion, and that the new bases for

the grant did not dispose all Petitioners claims on the face of her complaint, and that Petitioners "Request and Objections," were still pending and her opposition was not mentioned by either court as though she filed no opposition to summary judgment, or Objections to the erroneous findings.

Thereafter on December 9th, 2002 the Court ordered Respondents to respond to Petitioner's re-hearing en banc brief. **See Appendix C.**

The Ninth Circuit Court Struck from the record/ would not file Petitioners *en banc* (reply) brief to Respondents response of the order above to Respondents which is error, **See Appendix D.**

Petitioners reply stated the following: Respondents merely asserted that a re-hearing en banc should be denied on the basis that Petitioner fails to demonstrate that the panel rendering the September 18, 2002 memorandum disposition in this matter overlooked or misapprehended any point of law or fact as required by F.R.A.P. 40(a)(2) which was presented in Petitioners reply. Respondents failed to cite any authority in support of their position that the District Courts grant of summary judgment was proper. On this basis alone, the petition for re-hearing en banc should have been granted. Respondents rely on findings and recommendations from the District Court which were, and are, controverted as well as being just plain not in the file. Respondent cites *Slayton v. Ohio Dept. of Youth Services, 206 F. 3d 699 (6th Cir. 20000);* for the proposition that Petitioner may not recover in a lawsuit when the hostile work environment stems from inmates.

In fact *Slayton* qualifies this position: The *Slayton* court went on the say " This general rule against prison liability for inmate misconduct does not apply where the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior." Also see *Waymire v. Harris County, Tex 86 F.3d 424, 428-29 (5th Cir. 1996).* This is, and has always been, the gravamen of her complaint. The facts of this case clearly indicate that the institution steadfastly refused to take any such action until months *after* Petitioner became disabled though Respondents inaction. Substantial evidence was submitted demonstrating Respondents' failure to follow its own policies. Prisons may be liable for sexual Harassment or hostile work environment where, as here, proper preventative and remedial policies were not utilized. Please see *Hick v. Alabama 45 F.Supp.2d 921.*
The court in *Slayton* observed: "...no authority suggests that there is an absolute bar to Title VII liability when prison personnel encourage or instigate illegal inmate behavior." A Prison may be held liable where it creates the opportunity for and inmate assault on a prison employee. In *Slayton,* the Plaintiff was allowed a jury trial consistent with her Seventh amendment rights.

Slayton cited by Respondents clearly supports Petitioners position that she is entitled to a trial by jury and a factual findings by such jury at trial. Under the *Slayton* case cited by Respondents, require a trial. To establish liability for hostile environment Petitioner must prove *at trial* an objective element and a subjective element.

She may establish the objective element by proving that a "reasonable person in [her] position, considering all the circumstances" would find the environment hostile which changes the terms and conditions of employment. *Williams v. General Motors Corp. 187 F.3d 553.* She may establish subjective element by demonstrating that the environment was hostile to her. During Petitioners tenure, she was singled out and targeted by this inmate for rape and murder. Petitioner had worked around thousands of inmates including psychotic inmates. She witnessed depravity which did not cause Petitioner any emotional distress. Inmates flashing penises at Petitioner did not cause her emotional distress. General comments by various inmates did not cause her emotional distress.

In the instant matter, a convicted rapist and murdered with the wherewithal to carry out as assassination on Petitioner who promised it because of Petitioners rejection of him turned into extreme targeted events combined with refusal of Supervisors to (Act) caused her emotional distress. The inmate was (on paper only) discharged the same day received by DMH's psychiatric team and deemed not psychotic for the purposes of treatment. Inmate Glass was rejected as a patient in this hospital setting where Petitioner was assigned. He was merely located at DMH solely because CDC's refusal to retrieve him "their property" and "DMH refusal to remove him from Petitioners work area." Inmate Glass began his campaign of violence against Petitioner, by promising to rape and murder her (the same offenses against another person

resulted in his being subject to a life sentence). Please see Petitioners opposition to summary judgment with Separate Statement, attached to the appeal.

The essence of Petitioners claims is: that Respondents subjected her to a hostile work environment and retaliation in violation of Title VII and Wrongful discharge in violation of California law. The applicable standard of review is: 1. To view the facts "in the light most favorable to the plaintiff[,]" see *Ellison v. Brady, 924 F.2d 872;* and, 2. Review of the facts de novo, *Barnett v. Centorni, 31 F. 3d 813.* Standard of review for a motion for summary judgment. Because the Court admittedly considered matters outside of the pleadings and Respondents motion was heard as a motion for summary judgment. The grant of a motion for summary judgment by the Magistrate should have been reviewed by the District Judge de novo, and not as found by the Magistrate as stated in the District Courts order. Please see Rule 12(b) and *Ashton v. Cory, 780 F.2d 816, 818 (9th Cir. 1986).*

When considering facts outside of the pleadings the court must address a motion for judgment on the pleadings as a motion for summary judgment. Federal Rules of Civil Procedure, Rule 12 provides that the defense of failure to state a claim upon which relief may be granted may be raised by motion for judgment on the pleadings, or at the trial on the merits. Rule 12 also provides that if, as to a motion for judgment on the pleadings, the court considers matters outside the pleadings, the motion must be treated as a

motion for summary judgment. The District Court, for the same reasons mentioned above, should have reviewed the Magistrate's findings under this standard of reviewing the evidence in the light most favorable to Petitioner, as to whether or not there are any genuine issues of material fact, and whether the Magistrate Judge court correctly applied the relevant law.

The District Court failed to apply this standard. The court failed to consider admissible evidence, genuine triable issues of material fact were presented. On motion for summary judgment, the moving party must establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56 c states that an issue is genuine if the evidence is such that a reasonable jury could return a verdict for the opposing party. See *Anderson v. Liberty Lobby Inc. 477 U.S. 242 (1986).* The moving party must submit evidence that establishes facts, not conjecture, *Celotex Corp. v. Catrett 477 U.S. 242 (1986).* To avoid summary judgment on and issue upon which the opponent bears the burden of proof, the opponent must present affirmative evidence sufficiently probative such that a jury reasonably could decide the issue in favor of the opponent, which Petitioner so provided. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).* Respondents motion for summary judgment was not a motion for summary adjudication of issues. Petitioners opposition to Respondents motion was affirmative and

substantial. Nevertheless, the court apparently failed to consider evidence proffered by Petitioner in opposition, or her separate statement of material fact in opposition thereto. *T.W. Elec. Serv.,Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987).* Summary Judgment is also proper in an action if there are no genuine issues of material fact and the moving party is entitled to judgment under the legal principles that govern the case. *Moreland v. Las Vegas Metropolitan Police Dept., 159 F.3d 365, 369 (9th Cir. 1997).* Once the moving party meets this burden, (not met here by Respondents) the nonmoving party may go beyond pleadings and identify facts that show a genuine issue for trial. The party moving for summary judgment has the burden of showing an absence of a genuine issue of material fact. *Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997),* which could not be shown here due to the presentation of numerous pages (most official and business records provided by Respondents) disputing each and every one of Respondents contentions. See opposition to motion for summary judgement and the separate statement.

The District court admitted inadmissible evidence. The courts Pre-trial scheduling order containing the sanction that no witnesses nor evidence not filed with the court by December 06, 2000 could not be used at trial. The same Magistrate who authored the order, considered evidence which was not filed pursuant to that order. Petitioner asserts that when the court shows blatant favoritism by only holding one side to its

orders, it skews due process notions of fairness. The District court failed to preserve Petitioners rights under the seventh amendment to the united states constitution. By the court granting "Respondents motion for summary judgment, it abrogated Petitioners Seventh Amendment Rights to a trial by jury in civil cases. The Magistrate judges can't substitute findings for a jury, and make "independent findings," not proffered by either side or supported by the case file and find such against Petitioner, or grant Respondents summary judgement on issues wherein Respondents failed to proffer any evidence whatsoever on, and Petitioner proffered evidence on to the contrary, and still find in Respondents favor when the motion for summary judgment was overwhelming opposed by Petitioner, with evidence not mentioned by the court. See Petitioners opposition to summary judgment attached to Petitioners opening brief and her "objection to the Magistrates Findings and Recommendations never ruled upon.

It is Public Policy for the court to employ trial by jury. The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen... should be jealously guarded by the courts. *Jocob v. New York City, 315 U.S. 752, 752-53, 86L. Ed. 1166, 62 S. Ct. 854 (1942).* The Supreme Court has adopted a most rigorous standard for reviewing any potential infringement of the right to a civil trial. The Court has said more than once that "maintenance of the

jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres v. Westover, 359 U.S. 500, 501, 3L. Ed. 603, 55 S. Ct. 296 (1935).* In denying Petitioners Rehearing or en banc request, the Ninth Circuit Court circumvented its own established Law. The Circuit Court stated to Petitioner in its Memorandum to see, *Little* v. *Windermere Relocation, Inc., 2002 WL 84237, at *6 (9th Cir. Jan. 23, 2002)(as amended).*

The Circuit Court cited *Little v. Windermere Relocation, Inc.* in it's Affirmation of Summary Judgment which as is [Little], "requires a trial" as required by "Respondents cited [Stayton]" case. Here as is Little, Petitioner received only positive feed back from her supervisors prior to the events giving rise to her claims. As is Little Petitioners harassment was of a sexual nature; Petitioner initially worked for C.D.C. (California Department of Corrections) as a peace officer/nurse and was transferred within the same facility to the Department of Mental Health whereupon she had dual agency employment in her same capacity. The California Medical Facility at Vacaville State Prison, is the only Correctional Facility were Dual Agency employments exist. The District Court found no such agency post summary judgment.

Shortly after her arrival at the CDC facility at Vacaville, Petitioner became the victim and the focus of an inmate who had been convicted of rape

and of murdering his rape victim. Respondents failed to take any remedial measures, failed to follow procedures and, as alleged in Petitioners papers Respondents created a hostile work environment, or, acquiesced to it.

Petitioner alleged that Respondents non-response to the rape and murder threats created a hostile work environment in violation of Title VII and California law. Title VII of the Civil Rights Act of 1964, 42 U.S.C, Section 2000e *et. seq.*, prohibits sex discrimination, including sexual harassment in employment, 42 U.S.C., Section 2000e-2(a)(1); *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57,65-66 (1986).*

In evaluating a claim of sexual harassment based on a hostile work environment, the Court must determine two things: whether the petitioner has established that she or he was subjected to a hostile work environment, and whether the employer is liable for the harassment that caused the environment. See *Faragher. City of Boca Raton, 52 U.S. 755, 787-789(1998); Nichols v. Azteca Rest. Enter., Inc. 256 F .3d 864,871-875 (9th Cir.2001).* To establish that she was subjected to a hostile work environment, a Petitioner must prove that 1. She was subjected to verbal or physical conduct of a sexual nature, 2. This conduct was unwelcome, and 3. This conduct was sufficiently severe or perversive to alter the condition of employment and created an abusive working environment. *Fuller v. City of Oakland, 47 F.3d1522, 1527 (9th Cir. 1995).*

As is *Little,* Petitioner points out the neither the District court nor the Ninth Circuit, made any

findings as to the severity or pervasiveness of the conduct. As to the first element, it is admitted that Petitioner was subjected to verbal and physical conduct. As to the second element, no one disputes that Petitioner suffered altered conditions of employment. She was placed on temporary disability from work with current an up-to- date doctors letters submitted to the departments, and was placed in psychological treatment for a period of five years and remains on permanent social security disability, notwithstanding the District courts findings that Petitioner was AWOL, base upon Respondents stated allegation, and the court ignoring Petitioners excessive doctors letters to the contrary.

As to the third element, to determine whether an environment is sufficiently hostile or abusive to violate Title VII the court must examine "all the circumstances, including the frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance." *Clark County Sch. Dist. v. Breeden, supra, at page 1510 (2001); see Nichols, supra.* Moreover, "the work environment must both subjectively and objectively be perceived as abusive." *Fuller, at page 1527*; and, the objective portion of the claim is evaluated from the reasonable woman's perspective, *Ellison* at pages 879-880.

Petitioner asserts that pursuant to the forgoing, she has tendered sufficient evidence to preclude summary judgment as to her hostile work

environment claim. After all, as in *Little, supra,* Respondents subsequent inaction and reproval for reporting the incidents reinforced rather than remedied the harassment. She was warned that making reports might undermine her career. When she made her report to her supervisor about the sexual harassment, the male Senior MTA Supervisor shouted "you have not been sexually harassed!" Following, the incidents, she was ordered to her same post and subjected to the same rapist and murderer (a lifer) who apparently had enough wherewithal to carry out his threats of murdering Petitioner. Because no remedial action was taken by Respondents, Petitioner suffered serious psychological damage and was placed in treatment. Only months after Petitioner was placed on temporary disability did the employer purport to take remedial measures, proven by documents provided by Respondents to Petitioner, submitted in opposition.

Petitioner was subjected to constant verbal assaults and threats of rape and murder for a period of 28 days and mentally it has continued for years. She suffered ever increasing fear and anxiety. The treating physicians (some employed by the Petitioners employer) established a causal link between the hostile work environment and the damages suffered by her, and she was paid workers compensation for the alleged events. Please note, Petitioners doctor did not initiate her in obtaining Permanent Social Security Disability, it was Respondents Physicians only, her doctor had no involvement, for the continued denial of the facts

and treatment by Respondents is horrific.

The Memorandum issued by the Ninth Circuit Court of Appeals, Petitioner intuits, was based upon the holding in *Brooks v.City of San Mateo, 229 F.3d 917, 924 (9th Cir. 2000)* wherein the district court found that a single act followed by immediate corrective action defeated Petitioners claims. In the instant case, Petitioner exercised self-help with a co-employee. Later in litigation Respondents claimed credit for such measures; an untenable position based on the facts and Respondents own documentation. The "Frequency of the discriminatory conduct" is only one factor in the analysis. See Harris v. Forklift Systems, Inc. 510 U.S. 17,23(1993) noting that no single factor is required. "Conduct is actionable if it is either sufficiently severe or pervasive." *Meritor, supra.* The United States Supreme court noted that an isolated incident can amount to a Discriminatory change[...] in the "terms and conditions of employment when the incident is Extremely serious." *Breeden, supra.* Indeed, other circuits have come to a similar conclusion. See, e.g., *Tomka v. Seiler Corp. 66 F.3d 1295, 1305 (2d Cir. 1995)* "noting that even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability." In sum, taking the facts in a light most favorable to Petitioner, because her employer effectively condoned sexual harassment by the inmate, Petitioner was subjected to an abusive work environment that detracted from her job performance, work related stress preempted her

from remaining on the job, and kept her from advancing in her career. See *Harris, supra* 510 U.S. at 22. Furthermore, Petitioner alleged that, Respondent did not have a sufficient policy or at least one that was adequately enforced in holding Title VII complaints. In fact, Respondents own documentation showed that "training on this issue was not available because of Insufficient demand."(Paraphrased) The employer failed to at least adopt anti-discrimination policies, make a good faith effort to educate its employees about these policies and make good efforts to enforce the policy. See *Wuinarto, supra.* Petitioner submits that she has presented a triable issue of material fact as to this issue and under the Seventh Amendment, and is entitled to a trial by jury.

Employer liability for sexual harassment. Under Ninth Circuit jurisdiction, employers are liable for harassing conduct by non-employees "where the employer either ratifies or acquiesces in the harassment by not taking immediate and or corrective action when it knew or should have known of the conduct." *Folkerson v. Circus Circus Enters, Inc. 107 F.3d 754, 756) (9th Cir.1997).* The Equal Employment Opportunity Commission Guidelines endorse this approach: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisor employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29C.F.R., Section 1604.11(e). Thus, if

Respondents ratified the inmates conduct by, *inter alia*, denying to Petitioners face that she was harassed, it is liable for her harassment. Additionally, if no remedy is undertaken, or the remedy is ineffectual liability will attach. *Fuller, supra*, at 1528-28. Respondents will be liable for the hostile work environment created by it if a jury finds that it ratified or acquiesced in the harassment by failing to take appropriate measures.

Retaliation by termination. Under the anti-retaliation provisions of Title VII the California F.E.H.A. (Section 12940 of the California Government Code) it is unlawful for an employer to take adverse actions against an employee who complains about discrimination and harassment at work. Title VII and the F.E.H.A Provide for burden-shifting. After Petitioner makes a *Prima Facie* Case, the burden shifts to the employer to proffer a non-retaliatory explanation for the adverse action. Here, Petitioner set forth a *Prima facie* case for Wrongful Termination. Respondent attempted to meet its burden of production by simply stating in conclusion that Respondent did not proffer evidence to support, [without any evidence to support] their contention of a legal termination. In fact, as preserved below, Petitioner was on disability, an Respondents knew the same, at the time of termination. In her opening brief before the Ninth Circuit, Petitioner set forth the fact that the district court adopted Respondents theory even though no evidence in proper evidentiary form was proffered on this issue: no averments; no documents; zilch...

To established pretext "very little" direct evidence of discriminatory motive is sufficient. *Little, supra.* Assuming *arguendo*, that Respondents unverified and undocumented excuse raises a sufficient inference of legitimacy, a jury is required to make the factual determination. See *Page v. Superior Court, 37 Cal.Rptr. 2d 529.* Under *Little, Supra,* Petitioner need merely show: her involvement in a protected activity (making a claim); 2. an adverse employment action taken against her (termination): and, 3. a causal link between the two. It is unnecessary that Respondents acts be unlawful. See *Moyov. Gomez 40 F.3d 982,984 (9th Cir. 1994)* "..{O]f course, termination of employment is an adverse employment action [.]" *Little, supra.* Petitioner has presented a triable issue of material fact ripe for determination by a jury under the Seventh Amendment.

Genuine issues of material fact preclude summary judgment. Sexual harassment under Title VII. One of the three panel Ninth Circuit Judges who ruled on this case, The dissent "Hug," in *Rene v. MGM Grand Hotel, Inc. No 98-16924(9th Cir. 09/24/2002),* stated in essence, that the discrimination at issue must be based "upon race, sex, color, religion, sex (meaning gender) or national origin." In the instant case, Respondents harassment through ratification and /or acquiescence was directed specifically at gender bias. The conduct at issue, verbal assaults including threats of rape and murder, was based upon a convicted rapists fixation on Petitioner, this conduct was unwanted, offensive, and by failing to

enforce existing inadequate policies, by ignoring and denying the problem, no remedial action was taken or, if taken, taken a month or so later when Colbert was in treatment and placed on temporary disability. The harasser was motivated by sexual desire: As exhibits provided to the Courts, the harasser sent messages to Petitioner through other inmates, that she would be killed, ("shanked"), wrote sexually explicit letters, the inmate and two other inmates attempted a physical attack against Petitioner and she escaped with the aid of co-male employee, "MTA Noces". The employers encourage the conduct by ignoring it and the tape recording provided to the courts by the EEOC of testimony, the employer's duly authorized supervising agent, "Antonio Aguilar," stated, the harassment experienced by Colbert, "Comes with the job." Even under the stringent view of the dissenting opinion in *Rene*, Colbert has established triable issues of material fact! Rehearing was denied on February 13, 2003. **See Appendix A**.

CONCLUSION:

1. That the United States Supreme Court reverse the decision of the Ninth Circuit & District Courts grant of summary judgment;
2. For whatever further relief deemed proper.

Respectfully submitted,

Date: 4/13/03

Petitioner, SONJA COLBERT, in Propria Persona

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Eastern District of California (Sacramento) Docket Sheet #99-CV-2530

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STATUES INVOLVED IN CASE

FILED
FEB 13, 2003
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA COLBERT,	No. 01-17000
Plaintiff-Appellant,	DC# CV-9902530-MLS Eastern District of California (Sacramento)
DEPARTMENT OF MENTAL HEALTH; et all., OF CORRECTIONS, Defendant-Appelless.	**ORDER**

Before: HUG, O'SCANNLAIN, and TASHIMA, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judges O'Scannlain and Tashima have voted to deny the petition for rehearing en banc, and Judge Hug so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested

a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

01-17000

The motion to stay the mandate is denied.

The request for publication is denied.

No further filings will be accepted in this closed appeal.

FILED
SEP 18 2002
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA COLBERT, No. 01-17000

Plaintiff-Appellant, D.C. No. CV-9902530-MLS PAN

MEMORANDUM*

DEPARTMENT OF MENTAL HEALTH; et al.,

Defendants-Appellees.

Appeal from the United States District Court
from the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Submitted September 9, 2002**

Before: HUG, O'SCANNLAIN, AND TASHIMA, Circuit Judges.

Sonja Colbert appeals pro se the district court's summary judgment in favor of defendants in her action alleging sexual harassment and employment discriminations.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. See Fed.R. App. P. 34(a)(2).

We have jurisdiction pursuant to 28 U.S.C. 1291. Wee review de novo, Barnett v. Centoni, 31 F.3d 813, 815 (9th Cir. 1994)(per curiam), and we affirm.

The district court properly granted summary judgement to defendants because Colbert failed to raise a genuine issue of material fact concerning whether defendants failed to take immediate and appropriate corrective action in response to Colbert's complaints of sexual harassment. See Little v. Windermere Relocation, Inc., 2002 WL 84237, at *6 (9th Cir. Jan. 23, 2002) (as amended).

We have considered Colbert's remaining contentions and conclude that they lack merit.

AFFIRMED.

FILED
DEC 09 2002
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA COLBERT, No. 01-17000

Plaintiff-Appellant, DC# CV-9902530-MLS
Eastern District
of California
(Sacramento)

DEPARTMENT OF MENTAL
HEALTH; CALIFORNIA DEPARTMENT **ORDER**
OF CORRECTIONS,
Defendant-Appelless.

Before: HUG, Circuit Judge.

Appellee is ordered to file a response to appellant's petition for rehearing and petition for rehearing en banc filed with this court on October 4, 2002. The response shall not exceed 15 pages and shall be filed within 21 days of the date of this order. Fifty (50) copies of the response should be filed with the Clerk of the Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

January 7, 2003

TO: Sonja Colbert

FROM: Cathy A. Catterson, Clerk

SUBJECT: Defective Reply to Response to Petition for Rehearing

RE: Ca No. 01-17000 Colbert v. Dept of Mental

A petition for rehearing in the referenced case was received on January 6, 2003 and could not be filed for the following reason(s):

[XX] The reply has not been requested by the court and is not allowed to be filed. See FRAP 40 (a) (3).

FILED SEP 21, 2001
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

----o0o—

SONJA N. COLBERT	)	
	)	
Plaintiff,	)	CIV.NO.
	)	S-992530
	)	MLS PAN PS
	)	
v.	)	
	)	
CALIFORNIA DEPARTMENT OF MENTAL HEALTH AND CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. 636,et

seq., and Local Rule 72-302. On January 19, 2001 the magistrate judge recommended that defendants' motion for summary judgment be granted. On January 26, 2001 plaintiff filed objections to the findings and recommendation. Thereafter, defendants failed an opposition to plaintiff's objections, to which plaintiff filed a reply on February 7, 2001 without a certificate of service. Plaintiff reply, therefore, was stricken form the record for failure to comply with Fed. R. Civ.P. 5 and Local Rule 5-135. Plaintiff now request the court to reconsider the magistrate judge's ruling to strike her reply from the record and to find that the reply should be included in the court's de novo review of th file in reaching its decision on defendants motion for summary judgment.

Upon review of th record, the court discovered that the certificate of service at issue was filed one day after plaintiff's reply. In light of this information and plaintiff's pro per status, this court orders that plaintiff's reply should be re-filed in the record.

Thereafter, the court conducted a de novo review of the file, which included plaintiff's reply. Based upon that review, the court finds the magistrate judge's findings and recommendation to grant defendant's motion for summary judgment is supported by the record and by the magistrate judge's analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Magistrate judge's decision to strike from the record plaintiff's reply

filed February 7, 2001 is reversed;

2. The Findings and Recommendation filed January 19, 2001, are adopted in full; and

3. Defendants' motion for summary judgment is granted.

DATED: September 21, 2001

"s/_____".
UNITED STATES DISTRICT JUDGE

FILED JAN 19, 2001
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SONJA N. COLBERT

Plaintiff, CIV S-99-2530 MLS PAN PS

v.

CALIFORNIA DEPARTMENT OF MENTAL HEALTH AND CALIFORNIA DEPARTMENT OF CORRECTIONS,

Defendants.

FINDINGS AND RECOMMENDATION

–oOo–

On November 30, 1999, plaintiff Sonja Colbert filed a complaint pro se against defendants California Department of Mental Health and Department of Corrections in the Northern District of California for Sexual harassment and

employment discrimination in violation of Title VII, 42 U.S.C 2000e-5(f)(3)and 28 U.S.C 1406. Defendants move for summary judgment. Plaintiff requests as order striking defendants' motion as procedurally defective. On November 8 defendants' motion was submitted without argument. Plaintiff avers defendants failed to comply with the fair notice rule, which requires notice to a pro se *prisoner* of the consequences of failing to respond to a motion for summary judgment. See Rand v. Rowland, 154 F .ed 952, 956 (9th Cir. 1988). Defendants were not required to provide plaintiff, a non-prisoner pro se litigant, with such notice. Rand, *supra*, at 957-58; Jacobsen v. Filler, 790 F .2d 1362, 1364 n.4 (9th Cir. 1986)(refusing to extend fair notice rule to pro se non-prisoners). Plaintiff's request to strike defendants' motion is denied.

On a motion for summary judgment the moving party must establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ.P. 56(c) As issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the opposing party. Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986). A fact is "material" if it affects the right to recover under applicable substantive law. Id. The moving party must submit evidence that establishes issues upon which the movant bears the burden of proof; if the movant does not bear the burden of proof on an issue, the movant need only point to the absence of evidence to support the opponent's burden. Celotex Corp. v.

Catrett, 477 U.S. 317, 324 (1986). To avoid summary judgment on as issue upon which the opponent bears the burden of proof, the opponent must present affirmative evidence sufficiently probative such that a jury reasonably could decide the issue in favor of the opponent. Matsushita Elec. Indus. Co v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

There is no genuine dispute about the following material facts. On March 13, 1995, plaintiff began work for the Department of Mental Health ("DMH") as a Medical Technical Assistant ("MTA"). DMH operates a part of the California Medical Facility ("CMF") to provide psychiatric care to mentally ill inmates for the California Department of Corrections ("CDC"). At all times relevant to plaintiff's complaint she was employed by DMH.[1] On May 13, plaintiff and another MTA lodged written complaints with DMH about derogatory, sexually explicit, and profane comments made about plaintiff between May 5 and 13 by inmate Donald Glass. Glass was convicted of murdering a woman he had been previously convicted of raping and was currently serving 25 years to life. He was being evaluated for possible admission and treatment by DMH.

On May 14, in response to plaintiff's complaint, DMH temporarily reassigned plaintiff to

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1 Plaintiff contends she was a "dual employee" of CDC and DMH but fails to provide any evidentiary support for this contention.

another area, away from Glass, but plaintiff nonetheless performed some work that day where Glass was housed. On May 15, plaintiff lodged a second written complaint with DMH about threatening comments made by Glass. On May 16, Senior MTA Fabricate received a copy of plaintiff's complaint; Fabricante verbally admonished Glass and relieved plaintiff from providing further nursing care to him. On May 17, Glass filed a complaint with CDC accusing plaintiff of sexually assaulting him; DMH moved Glass to another unit away from plaintiff.[2] On May 24, DMH initiated an investigation into plain tiff's written complaints. On May 27, DMH placed Glass temporarily in a locked unit after plaintiff complained to Senior MTA Masuret that Glass "leered at her from a stairwell. Plaintiff left work on stress leave and never returned to CMF. On May 31, DMH filed a report of its investigation into plaintiff's complaints with CDC (which had Glass' complaint about plaintiff). That same day plaintiff filed a formal complaint with DMH seeking (1) to move Glass to another institution and (2) EEO training for her supervisors for their failure to respond adequately to her complaints of harassment. On June 1, DMH moved Glass to a locked unit pending further investigation

---

2 To facilitate this move by DMH CDC placed Glass in administrative segregation for 10 days.

of plaintiff's allegations.[3] Also on June 1, plaintiff submitted; CMF's warden (CDC) responded to these complaints in writing. Plaintiff's doctor cleared her to return to work on October 4, 1995, conditional upon her transfer to another correctional facility. DMH placed plaintiff on leave of absence until March 2, 1999. When plaintiff failed to return to work, DMH found her absent without leave and terminated her employment on March 23, 1999 as if she had resigned. Plaintiff sues defendants for discrimination on account of sex and seeks to hold defendants liable for Glass' sexual harassment of her in violation of Title VII.[4] In pertinent part Title VII provides: 2000e-2. Unlawful employment practices (a) Employer practices It shall be an

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3 CDC placed Glass in administrative segregation pending further administrative review and adjudication of Glass' complaint and DMH"s investigation of plaintiff's complaints. In hearings on June 6 and 25, CDC found Glass guilty of threatening behavior toward plaintiff and violating CMF rules in connection with his May 27 harassment of plaintiff for which he was assessed a 90-day loss of behavior credits and warned of the consequences of future violations.

4 Plaintiff also presented as administrative complaint to the California Department of Fair Employment and Housing ("FEHA") for discrimination and wrongful termination on account of mental disability. Plaintiff did not submit evidence of final resolution by FEHA of that claim and it is therefore not before this court.

unlawful employment practice for an employer– (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

For the purposes of Title VII, the term "employer" means a person engaged in a industry affecting commerce who has fifteen or more employees or any agent of such a person.

Plaintiff asserts that both DMH and CDC are liable for wrongful termination and condoning Glass' harassment of her. However, at all relevant times plaintiff was employed by DMH and CDC is not liable to her under Title VII.

To prevail on a claim against DMH for wrongful termination on account of sex under Title VII plaintiff must show DMH considered gender as a factor in an employment decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41 (1989). Plaintiff contends that DMH refused to accommodate her return to work but has not proffered any evidence showing that gender played a motivating part in her termination. Plaintiff fails to established sex discrimination by DMH in connection with her discharge under Title VII. Id. at 244.

Sexual harassment may be actionable under Title VII where (1) Plaintiff was subjected to verbal or physical conduct of a sexual nature; (2) this conduct was unwelcome; and (3) the conduct was sufficiently sever or pervasive to alter the conditions

of the victim's employment and create as abusive working environment. Fuller v. City of Oakland, 47 F .3d 1522, 1527 (9th Cir. 1995)(quoting Ellison v. Brady, 924 F.2d 872, 875-876 (9th Cir. 1991)). The working environment must be perceived as subjectively and objectively abusive based on the totality of the circumstances. Harris v. Forklift Sys., Inc., 510 U.S. 17,20-22(1993).

Plaintiff contends that on three separate occasions Glass yelled verbal obscenities to her and threatened her and on another occasion he "leered" at her from a stairwell. Because correctional employees have accepted they will face inappropriate and often lewd behavior, inmate misconduct alone is insufficient to support a claim for hostile work environment. See Slayton v. Ohio Dep't of Youth Services, 206 F .3d 669, 677 (6th Cir. 2000) (Citations omitted).

Defendants may nevertheless be liable under Title VII if they knew or should have known of the alleged conduct and failed to take appropriate steps to remedy or prevent it. CF. Waymire v. Harris County, Tex., 86 F .3d 424,428-29 (5th Cir. 1996) (prompt remedial action by institution defeats claim of hostile work environment premised on offensive inmate conduct). Remedies for harassing behavior need only be proportional to the seriousness of the offense and reasonably calculated to end the harassment. See Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991).

Plaintiff contends DMH acquiesced to Glass' conduct by failing to move inmate Glass to another facility. However, DMH's remedial efforts need not

meet plaintiff's expectations to satisfy Title VII, which requires only that the employer take steps reasonably likely to stop the harassment. Saxton v. American Tel. & Tel Co., 10 F .3d 526, 536-37 (7th Cir. 1993). In response to plaintiff's complaints about Glass' verbal comments about her, DMH attempted to minimize plaintiff's exposure to Glass by reassigning her from the unit where Glass was housed (for evaluation for psychiatric treatment), verbally admonishing Glass and relieving plaintiff of his direct care, and, finally moving Glass to another unit and initiating an investigation that resulted in three months being deducted from his good behavior credits. Although DMH did not comply with plaintiff's request to transfer Glass, plaintiff nevertheless fails to demonstrate that DMH's remedial efforts were so insufficient as to condone Glass' behavior in violation of Title VII. Accordingly, for the foregoing reasons defendant's motion for summary judgment should be granted.

Dated: January 18, 2001.

"s/_____/"
Peter A. Nowinski
United States Magistrate Judge

Sonja Colbert
P.O. Box 31894
Oakland CA 94604

ORIGINAL FILED
JAN 26, 2001
Clerk U.S. District Court
Eastern District of California
By_____
Deputy Clerk

TELEPHONE: (510) 757-6072

Plaintiff SONJA COLBERT, IN PROPRIA PERSONA

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SONJA COLBERT, NO. CIV-S-992530MLS PAN PS

Plaintiff,

vs.

PLAINTIFF'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CALIFORNIA DEPARTMENT OF MENTAL HEALTH AND CALIFORNIA DEPARTMENT OF CORRECTIONS,

Defendants,

_____/

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The subject controversy arises by virtue of Plaintiff, a state employee at CMF State Prison, being repeatedly and explicitly sexually harassed and threatened with death and serious bodily harm from an inmate convicted of murdering his rape victim. Plaintiff alleges that Defendants were duty bound by established policies to take steps to protect Plaintiff and prevent such harassment and threats. Plaintiff alleges that Defendants failed to take proper steps, under the policies to so protect her. Plaintiff alleges that she was harmed by Defendants' failure to comply with their own policies. Plaintiff also sought relief for wrongful termination after she blew the whistle regarding Defendants' omissions.

II. FACTS

On or about May 16, 2000 this Court issued its fist pre-trial scheduling Order. No objections were made to this Order. Plaintiff complied with all orders.

Pursuant to the above Order, Plaintiff filed her Motions in Limine on October 2, 2000. Thereafter, Defendants filed their joint Motion for Summary Judgment.

On or about October 20, 2000 this Court vacated its May 16, 2000 pre-trial scheduling order with no objection of the parties. Plaintiff did not object because the 6 plus weeks advance notice was sufficient.

On or about October 20, 2000 this Court issued its new pre-trial scheduling order aware that the above motions of the parties were pending, and which order required that all parties present a joint Pre-Trial Statement on or about December 6, 2000, disclosing all witnesses and evidence to be proffered at trial of the matter. Plaintiff complied in filing a Separate Pre-Trial Statement consisting of 81

Exhibits and over 1700 hundred pages of text disclosing Expert witnesses, percipient witnesses and documentary evidence to be proffered at trial.[1] The subject Pre-Trial Scheduling Order contained the following severe sanction: Any party failing to disclose in the Pre-Trial Statement all witnesses and documents to be used at trial would be prevented from proffering such evidence or witnesses at trial.

On or about December 4, 2000, Defendants' counsel Lisa A. Williams unilaterally contacted Court's clerk, stated that Defendants were not ready and asked that the Pre-Trial Scheduling order containing this severe sanction be vacated. The Court vacated its Pre-Trial Scheduling order. Plaintiff, after complying with the order, received notice that the same was vacated on December 7, 2000.

On or about December 11, 2000 Plaintiff filed her Motion for Reconsideration of the Court's vacation of its Scheduling order, *inter alia*, on the ground that by Defendants avoiding the severe sanction contained the Court's scheduling order by unilateral communication with the Court's clerk to vacate such order is unseemly. It gives the appearance of impropriety and suggests collusion between the State and the Federal Court; an appearance the Court is duty bound to avoid.

The Court did not rule on Plaintiff's Motions in Limine notwithstanding the fact that it was

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1 Plaintiff filed a *Separate* Pre-Trial Statement because Defendant's failed to communicate with Plaintiff in preparation of a *Joint* Pre-Trial Statement.

unopposed, was filed prior to Defendants' Motion for Summary Judgment, the results of which would impact the pending Motion for Summary Judgment.

The Court also failed to rule on Plaintiff's Motion for Reconsideration of its vacating the Pre-Trial Scheduling order based upon the ex parte request of Defendants' counsel.

Defendants' joint Motion for Summary Judgement alleged that Plaintiff's complaint failed to raise a triable issue of material fact.

Defendants did not demurrer to the Complaint on the above basis, did not move to strike the complaint on the above basis, did not move for judgment on the pleadings, nor did Defendants move for a more definite statement on the pleadings.

Defendants concede that they waived their rights regarding the above tactics.

Defendants did not seek a finding of fact by the court in its motion for summary judgment. The court gratuitously made such findings in its issued findings and recommendations.

The Magistrate Judge, Peter A. Nowinski, did not address the issue presented by Defendants' motion for Summary Judgment: Does Plaintiff's complaint fail to raise a triable issue of material fact?

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[2]

A. STANDARD OF REVIEW

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2 Defendants' motion is actually a motion for judgement on the pleadings being treated as a motion for summary judgment pursuant to Rule 12.

Federal Rules of Civil Procedure, Rule 7(a) provides that pleadings consist of a complaint and an answer.

Fed.Rule.Civ.Pro, Rule 12 provides that the defense of failure to state a claim upon which relief may be granted may be raised by motion for judgment on the pleadings, or at the trial on the merits.

Rule 12 also provides that if, as to a motion for judgment on the pleadings, the court considers matters outside the pleadings, the motion must be treated as a motion for summary judgment.

Because the Court considered matters outside of the pleadings and the Defendants' motions was heard as a motion for summary judgment, the grant of a motion for summary judgment by the Magistrate Judge should be reviewed by the District Judge de novo[3]. Please see Rule 12(b) and Ashton v. Cory, 780 F.2d 816, 818 (9th Cir. 1986).

The District, for the same reasons, must consider whether, viewing the evidence in the light most favorable to Plaintiff, there are any genuine issues of material fact, and whether the Magistrate Judge correctly applied the relevant law.

B. GENUINE TRIABLE ISSUES OF MATERIAL FACT ARE PRESENTED

On Motion for Summary Judgment, the moving party must establish that no genuine issue

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3 While Plaintiff could not locate law on point, she reasons that if the appellate court must use this standard, the same standard should be used by the District Court in reviewing the findings of recommendations of the Magistrate Judge.

of material fact exists and that the moving party is entitled to judgment as a matter of law.

An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the opposing party. Anderson v. Liberty Lobby Inc. 477 U.S. 242 (1986).

The Magistrate Judge found the following as fact:

1. Defendants averred in their moving papers that Plaintiff was employed by DMH and not CDC. Defendant proffered no evidence whatsoever on this issue. Plaintiff submitted her declaration in support of her contention of "dual employment" with both entities. The Magistrate Judge determined this issue in Defendants' favor[4]. The Magistrate Judge had a duty to determine this in a light most favorable to Plaintiff. Here, no evidence whatsoever was presented by Defendants to support this contention. Plaintiff submitted her Declaration in support of this contention. The Court is in possession of a complete copy of the EEOC case file in this matter which contains findings therein establishing Plaintiff's dual employment status. Please also see Exhibit 13 attached to Plaintiff Opposition to Summary Judgment..

The Magistrate Judge should have determined this issue in Plaintiff's favor, or at the

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4 Please see page 2 fn1 of Findings and Recommendations.

very least, allowed a jury to determine this issue.

2. The Magistrate Judge found as a mater of fact that Plaintiff lodged a written complaint on May 13 about derogatory, sexually explicit, and profane comments made about Plaintiff by Glass between May 5th and May 13th as averred by Defendants[5]. In support thereof, Defendants proffered a selection of Plaintiff's deposition. Defendants omitted other parts of Plaintiff's deposition stating that written and oral informal complaints were made beginning May 5th.

In opposition thereto, Plaintiff proffered the Declaration of Leslie Price (Exhibit 14), indicating that Plaintiff had made several informal written complaints to her supervisors between May 1st and May 13th. Plaintiff also made numerous oral complaints to her supervisors (see Plaintiff's Declaration in Opposition to Summary Judgment). Plaintiff averred in her Declaration that she had not made a formal written complaint before the 13th because she was not offered any training as to how to do so.

On the issue of whether or not Plaintiff made written complaints before May 13th is a genuine issue of material fact to be determined by a jury under Plaintiff's 7th Amendment rights. The Magistrate Judge determining this issue against Plaintiff in a light most favorable to Plaintiff,

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5 Please see Findings and Recommendations, page 2.

Plaintiff submits, is error.

3. The Magistrate Judge found as a matter of fact that on May 14th, "in response to Plaintiff's complaints, DMH temporarily reassigned plaintiff to another area, away from Glass..."

In support of this contention Defendants proffered Exhibits A and C (declarations of Fabricante and Plaintiff's work schedule). In opposition thereto, Plaintiff proffered her Vacaville State Prison work schedule (Exhibit 12) which shows that she worked her usual shift and at her usual post. This government business record kept in the usual and ordinary course of business is evidence clearly showing that Plaintiff was not re-assigned as found by the Magistrate Judge. While the Magistrate Judge finds that Plaintiff was re-assigned, even Defendants' evidence shows that Plaintiff was "floated" on this one shift.

In viewing this evidence in a light most favorable to the Plaintiff, this issue should have been found in Plaintiff's favor, or, in the alternative, left to a jury to determine.

4. The Magistrate Judge found as a matter of fact that on May 16th, "Fabricante [EEO Coordinator] verbally admonished Glass and relieved plaintiff from providing further nursing care to him."

In support of this contention, Defendants proffered Fabricante's unsigned declaration which stated that he (Fabricante) "floated" Plaintiff to another post for an irregular shift. Fabricante does not state that he re-assigned or transferred Plaintiff.

In opposition thereto, Plaintiff proffered her Vacaville State Prison work schedule which indicates that Plaintiff was "floated" to another area for one, and only one, shift of the two shifts she worked that day. The work schedule also shows that after the "floater" shift, due to the facility being short of staff, Plaintiff worked her regular shift at her usual post (where Glass resides and sexually harassed Plaintiff).

In examining this issue in a light most favorable to Plaintiff, this issue should be resolved in Plaintiff's favor due to her supporting evidence and due to the fact that Defendants' evidence does not contradict Plaintiff's evidence. There is no evidence proffered by anyone in this case that shows that Plaintiff was re-assigned or transferred away from Glass. This issue should remain a jury issue under Plaintiff's 7th Amendment rights.

5. On May 17th Plaintiff witnessed SRN. Dora Gardner attempt to tear up Glass's 602. Ms. Price grabbed it out of Gardner's hand. Sr. MTA Andres told Plaintiff flatly that Plaintiff was not being harassed by Glass. Plaintiff, in fear not only directly due to Glasses conduct and the failure of her supervisors to follow their own policies and take appropriate action, but also because fellow prisoners informed her that Glass was going to have Plaintiff "shanked," Plaintiff, on her day off, sought out Union Chapter President, Leslie Price, and asked Price for help in getting Glass moved away from her. Ms. Price and Plaintiff went to Lt. Cotton and Lt. Hollis in Unit 2 and asked to permanently move Glass to another Unit. Cotton and Hollis

helped Plaintiff and Price move Glass to permanent lockup housing in Unit 2 due to illegal use of a 602 form, not for what Glass was doing to Plaintiff. Glass was locked down in Unit 2 for 10 days, (across the hall from Plaintiff's post. He was not moved to another location in administrative segregation.

The Magistrate Judge found, as a matter of fact, that "DMH moved Glass to another unit away from Plaintiff."

In support of this contention, Defendants proffered Fabricante's unsigned declaration. Fabricante was not involved in the facts and circumstances and does not have personal knowledge of the facts and circumstances he avers in his Declaration.

In opposition, Plaintiff proffered her signed, under penalty of perjury, Declaration and the Declaration of President Leslie Price, also signed under penalty of perjury.

Given the foregoing, a jury could go either way on this issue. A genuine issue of material fact is presented. Examining these juxtaposed positions in a light most favorable to the Plaintiff, Plaintiff should have prevailed or, in the alternative, pursuant to the 7th Amendment to the United States Constitution a jury should be the trier of fact as to this issue.

6. The Magistrate Judge found that on May 24th "DMH initiated an investigation into plaintiff's complaints". This did not occur. There investigation was initiated in Jun, after Plaintiff was placed on disability for emotional damage due to

the allegations contained in Plaintiff's complaint.

In support of this contention, Defendants proffered Exhibit D which is a rules violation report purportedly signed by Plaintiff. Defendants, in their separate statement of undisputed material facts at page 5, paragraphs 36 and 37 admit that the signature of Plaintiff is not her signature.

In opposition, Plaintiff proffered her Declaration, the very same Exhibit document which someone other than Plaintiff signed as Plaintiff. At the bottom of this document it is indicated that DMH's investigation began on June 6, not on May 24th.

In reviewing this evidence in a light most favorable to Plaintiff, Plaintiff should prevail on this issue, or, in the alternative, under the 7th Amendment, a jury should determine this issue.

7. The Magistrate Judge found, as a matter of fact, that due to the investigation initiated on May 24th (it has been shown, above, that this investigation was initiated on June 6th or that a jury should be allowed to determine if the investigation began on May 24th or June 6th). On "May 27 DMH placed Glass temporarily in a locked unit after plaintiff complained to Senior MTA Masuret that Glass leered at her..."

In support of this contention, Defendants proffered a selection of Plaintiff's deposition transcript, Exhibit H, (Masuret's Rule Violation Report dated June 7th on a report dated July 5th) Exhibit O, (Plaintiff is unable to determine what Exhibit O is) and the Declaration of Fidel which states that he (Fidel) has provided records to

Defense Counsel.

In opposition, Plaintiff submitted her Declaration and the Declaration of Senior MTA Masuret which clearly indicated that Glass was temporarily locked up due to his conduct toward Masuret. Glass's conduct toward Plaintiff had nothing to do with it. Plaintiff also proffered Exhibit 7, last page. This is Senior MTA Masuret's 115 report of Glass's conduct toward him and which was processed, unlike Plaintiff's write ups, within 30 minutes of the event. Also, Plaintiff proffered Exhibit 8, a letter from Plaintiff to Price as requested by Price detailing the chronological events. This is a genuine issue of triable fact for jury determination.

On May 27th, Plaintiff, because of emotional trauma due to Defendants failure to take any action consistent with their policies to protect Plaintiff, became disabled and did not return to DMH.

8. The Magistrate Judge found, as fact, that on "May 31, DMH filed a report of its investigation into plaintiffs complaints with CDC..." How this could occur when the documentation shows that the investigation was not initiated until June 6th is unclear to Plaintiff.

In support of this contention, Defendants cite the very same Exhibits as previously listed.

Plaintiff presented the very same opposition evidence upon which a jury could decide either way.

The other events found, as fact, by the Magistrate Judge chronologically after May 27th are disputed, however, the gravamen of this case is that DMH and CDC had a duty pursuant to their own

policies to protect Plaintiff. They failed to do so. Plaintiff became emotionally paralyzed as a result. Post May 27th remedial measures (after the damage was done) is not admissible evidence in this case. Given, as demonstrated above, that genuine issues of material fact exist, a jury should make such evidentiary determinations. The Magistrate Judge should not substitute his findings for that of a jury. Plaintiff has not consented to a Magistrate Judge presiding over her trial.

9. While the Magistrate Judge found as fact that "Plaintiff's doctor cleared her to return to work on October of 1995, conditioned upon her transfer to another correctional facility. DMH placed Plaintiff on leave of absence until March 2, 1999. When Plaintiff failed to return to work, DMH found her absent without leave and terminated her employment on March 23, 1999 as if she had resigned."

It is true that Plaintiff's doctor released her to return to work on, *inter alia*, this condition. If is further true that DMH placed her on leave of absence until March 2, 1999.

Between October of 1995 and March of 1999 Plaintiff and Plaintiff's doctor wrote approximately 18 letters to DMH asking to return to her employment under the specified conditions. Defendant DMH failed and refused to allow Plaintiff to return to work.

The Magistrates Judge's finding that "Plaintiff failed to return to work..." is erroneous.

In support of the Magistrate Judge's findings, Defendants proffered no evidence whatsoever all

but merely stated, without evidentiary support, that Plaintiff left work on May 27th and never returned.

In opposition, Plaintiff proffered her declaration, and Exhibit 20 (DEFH complaint of wrongful termination, Plaintiff letters to the appeal board, her Doctor's letters dated 09/27/95 (2) 10/23/95, 12/14/95, 03/05/96, 04/16/96, 06/26/98, and a letter of 02/13/96 from DMH stating that they would review Plaintiff's status, which was not done).

Given the contentions of both parties, the fact that Defendants proffered no evidence at all and Plaintiff proffered evidence in support of her contention, there exists a genuine triable issue of material fact suitable for a jury determination.

CONCLUSION

Plaintiff has a meritorious claim under Fuller v. City of Oakland 47 F.3d 1527 (9th cir. 1995) and Ellison v. Brady 924 F.2d 872 (9th Cir. 1991). She also has a meritorious claim for wrongful termination, the facts of which must be determined by a jury..

Here, the Magistrate Judge substitutes his findings in the place of a jury in a situation where a jury could go either way on the evidence presented.

Plaintiff demonstrated that genuine triable issues of material fact exist requiring jury determination pursuant to Plaintiff's 7th Amendment Rights under the US Constitution. The "Findings and Recommendations" issued by the Magistrate Judge should be vacated and Defendants Motion for Summary Judgment should

be overruled as without merit.

IV. THE COURT MADE ITS FINDINGS AND RECOMMENDATIONS PREMATURELY

Inasmuch as Plaintiff filed her motions in limine prior to Defendants filing their motion for summary judgment, which motions in limine were unopposed, and which motions in limine would affect the evidence before the court as to the Summary Judgment motion, the Magistrate Judge made its findings and recommendations prematurely. It was incumbent upon the Magistrate Judge to determine the motions in limine before deciding the motion for summary judgment.

Had Plaintiff's motions in limine been ruled upon before ruling on the motions for summary judgment, portions of Defendants' evidence would not be available to Defendants.

Plaintiff can see no reason why her unopposed motions in limine were not granted or even addressed by the court.

CONCLUSION

The court should issue its ruling on Plaintiff's unopposed motions in limine poste haste.

V. THE COURT SHOULD RULE ON PLAINTIFF'S MOTION FOR RECONSIDERATION

As stated above in the facts, the Court issued its Pre-Trial Scheduling Order while Plaintiff's motions in limine were pending and while Defendants's motion for summary judgement was pending.

Inasmuch as the Pre-Trial Scheduling Order contained a severe sanction for non-compliance and

inasmuch as Plaintiff complied. Plaintiff should not be punished by losing the advantages for trial derived through her diligence. Conversely, Defendants, who unilaterally contacted the Court's clerk to vacate the Pre-Trail Scheduling Order because they weren't ready, should not be rewarded for their lack of diligence and a cavalier attitude not taking Court orders seriously.

Had Defendants not engaged in an ex parte communication with the court's clerk to vacate the Pre-Trail Scheduling order, Defendants' motion for summary judgment would be moot for a lack of evidence and witnesses.

Had the court ruled on and granted Plaintiff's motion for reconsideration, Defendants would have no witnesses and no documentary evidence at trial.

CONCLUSION

The court should reinstate the Pre-Trial Scheduling order and impose sanctions therein against Defendants.

WHEREFORE, Plaintiff prays:

1. That this District Court vacate the Magistrate Judge's "Findings and recommendations" and overrule Defendants' Motion for Summary Judgment;

2. That this District Court grant Plaintiff's motions in limine which were not opposed;

3. That the vacated Pre-Trial Scheduling order be reinstated and the sanctions contained therein imposed; and,

4. For whatever further relief the court may deem proper.

Respectfully submitted,

Date:_____

"s/_____/"
Plaintiff SONJA COLBERT, in Propria Persona

Sonja Colbert
P.O. Box 31894
Oakland CA 94604

TELEPHONE:
(510) 757-6072

FILED JAN 26, 2001
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY_____
DEPUTY CLERK

Plaintiff SONJA COLBERT, IN PROPRIA PERSONA

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SONJA COLBERT,

Plaintiff,

vs.

CALIFORNIA DEPARTMENT OF MENTAL HEALTH AND CALIFORNIA DEPARTMENT OF CORRECTIONS,

Defendants,

_____/

NO. CIV-S-992530
MLS PAN PS

PLAINTIFF'S OBJECTION TO THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THIS HONORABLE COURT and TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN: PLEASE TAKE NOTICE that Plaintiff will, and does hereby, interpose her objections to the Magistrate Judge's Findings and

Recommendations. Plaintiff's Objections is, and will be, based upon this Notice, the Points & Authorities attached hereto, Plaintiff's declaration, all papers and documents on file herein as well as upon any testimonial or demonstrative evidence adduced at hearing hereof.

Date:_____

s/_____/
Sonja Colbert, Plaintiff in Pro Per

Sonja Colbert
P.O. Box 31894
Oakland CA 94604
TELEPHONE: (510) 757-6072

Plaintiff SONJA COLBERT, IN PROPRIA PERSONA

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SONJA COLBERT, NO. CIV-S-992530MLS PAN PS

Plaintiff,

vs.

DECLARATION OF PLAINTIFF IN SUPPORT OF PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CALIFORNIA DEPARTMENT OF MENTAL HEALTH AND CALIFORNIA DEPARTMENT OF CORRECTIONS,

Defendants,

_____/

I, SONJA COLBERT, Plaintiff in Propria Persona, declare as follows:

1. I have caused the accompanying Plaintiff's Objection to Magistrate Judge's findings and

recommendations and know the contents thereof to be true of my own knowledge except as to those matters alleged under information and belief and as to such matters I believe the same to be true.

This Declaration is executed this _____ day of January 2001 at Oakland, CA.

s/_____/
Sonja Colbert, Plaintiff in Pro Per

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket # : 01-17000
Filed: 10/12/01

Nsuit: 3442 Jobs (Fed)
Colbert v. Dept of Mental, et al
Appeal from: Eastern District of California (Sacramento)

Cast type information:
1) civil
2) private
3)

Lower court information:
District: 0972-2 : CV-9902530-MLS
Date Filed: 12/22/99
Date order/Judgment : 9/24/01
Date NOA filed: 9/28/01

Fee status paid

Prior cases:
None
Current cases:
None
Docket as of February 20, 2003 11:16 pm
Page 1

01-17000 Colbert v. Dept of Mental, et al

SONJA COLBERT	Sonja Colbert
Plaintiff-Appellant	510/757/6072

[NTC prs]
P.O. Box 31894
Oakland, CA 94604

v.

DEPART OF MENTAL HEALTH Karen Kiyo Huster, Esq
Defendant-Appellee
FAX 510-622-2121
510-622-2197
20th Floor
[COR LD NTC day]
DEPARTMENT OF JUSTICE
Office of the Attorney General
P.O. Box 70550
Oakland, CA 94612-0550

CALIFORNIA DEPARTMENT OF CORRECTIONS
Defendant-Appellee
Karen Kiyo Huster, Esq.
(See above)
[Cor LD dag)

01-17000 Colbert v. Dept of Mental, et al

SONJA COLBERT

Plaintiff-Appellant

v.

01-17000 Colbert v. Dept of Mental, et al

10/12/01 DOCKETED CAUSE ENTERED APPEARANCE OF APLT IN PRO PER AND COUNSEL FOR APLES. CAD SENT (y/n): N Setting schedule as follows: Fee payment is due 10/26/01; appellant's designation of RT is due appellee's designation of RT is due 10/18/01,; appellant shall order transcript by 10/29/01; court reported shall file transcript in DC by ; certificate of record shall be filed by 12/5/01 ; appellant's opening brief is due 1/14/02, appellees' brief is due 2/13/02, [01-17000] (kkw)

10/24/01 Received notification from District Court re payment of docket fee. (Date: 10-4-01 [01-17000] (gail)

10/24/01 Rced Aplt's document titled "supplemental statement of issues on appeal" filed in dist ct on 10/4/01 CASEFILE
[01-17000] (gail)

11/7/01	Rec'd notice of change of address from Karen Kiyo Huster, counsel for Appellees Ca Dept. of Correction and Dept of Mental dated 11/01/01. (CASEFILE) [01-17000] (sm)
12/17/01	Filed original and 15 copies Appellant Sonja Colbert opening brief (Informal: no) 24 pages and five excerpts of record in 01volumes; served on 12/17/01 [01-17000] (gail)
2/12/02	14 day oral extension by phone of time to file Appellee Dept of Mental, Appellee Ca Dept. of Correct's brief. [01-17000] appellees' brief due 2/27/02,; appellants' reply brief due 14 days fr svc of ans br. (terr)
2/13/02	Received Appellant Sonja Colbert's opposition to Aple's req for ext of time [ti file answ brf]; served on 2/12/02 (N.A.N. per PROMO) [01-17000] (gail)
2/26/02	Filed original and 15 copies Appellees-CA Dept of Mental Health and CA Dept. of Corrections brief, 11 pages, 01 Supp'l Exc. Vols: served on 2/26/02 (minor defcy: missing st of rel cases) Notified counsel. [01-17000] record on appeal due 3/15/02; (gail)
3/5/02	Received Appellees' satisfaction of (minor)brief deficiency (st of rel cases) [01-17000] (gail)
3/12/02	Filed original and 15 copies Sonja Colbert reply brief, Informal: n) 7 pages, and 5 suppl. Excerpts in 1 vol.;

served on 3/12/02 [01-17000] (hh)

5/7/02 Calendar check performed [01-17000] (th)

5/10/02 Screening letter sent. [01-17000] (th)

5/20/02 FILED CERTIFIED RECORD ON APPEAL: 3 CLERK'S RECORDS, 1 REPORTER'S TRANSCRIPT, & 2 BULKY DOCUMENTS. (ORIGINAL) (01-17000) (sd)

01-17000 Colbert v. Dept of Mental, et al

9/9/02 SUBMITTED TO SCREENING PANEL 345. (Oral) [01-17000] [01-17000] (th)

9/18/02 FILED MEMORANDUM: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Unsigned, Unpublished. Procter R. HUG, Diarmuid F. O'SCANNLAIN, A. W. TASHIMA) FILED AND ENTERED JUDGMENT. [01-17000] (sm)

9/30/02 Received Sonja Colbert's request for publication of memorandum disposition (timely); served on 9/29/02 (to PANEL) [01-17000] (sm)

9/30/02 [4543843] Received original and 50 copies Appellant Sonja Colbert's petition for panel rehearing and rehearing en 10 pages, deficient: print

too small and margins are incorrect, served on 9/29/02. Notified pro se. (Sm)

9/30/02 Filed Appellant Sonja Colbert's motion for stay of mandate; served on 9/29/02 [4544860] (to STAFF) [01-17000] (hh)

10/4/02 [45484011] Filed original and 50 copies appellant Sonja Colbert petition for panel rehearing and petition for rehearing en banc 11 p.pages, served on 10/4/02 STAFF [01-17000] (gar)

10/10/02 Received Appellant Sonja Colbert's addendum to petition for enbanc rehearing (amended table of contents and authorities) [4548401-1], served on 10/10/02 (STAFF ATTORNEY) [01-17000] (sm)

12/9/02 Filed order (Procter R. Hug): Appellee is ordered to file a response to appellant's petition for rehearing and petition for en banc rehearing en banc filed with this court on 10/24/02. The response shall not exceed 15 pages and shall file within 2 days of the date of this order. Fifty (50) copies of the response should be filed with the clerk of the court. [01-17000] (sm)

12/30/02 Filed Appellees Dept of Mental Health and CA Dept. of Correction's response to petition for rehearing enbanc [4548401-1], 9 pages; served on 12/30/02 (to STAFF)

[01-17000]

1/6/03 Received Appellant Sonja Colbert's reply to aple's response re: aplt's petition for rehearing en banc [4548401-1]; Served on 1/5/03 (deficient: not ordered by court) Notified aplt. (CASEFILE) (hh)

01-17000 Colbert v. Dept of Mental, et al

2/13/03 Filed order (Diarmuid F. O'SCANNLAIN AND A. W. TASHIMA): The petition for panel rehearing and the petition for rehearing en banc are DENIED. The motion to stay the mandate is DENIED. The request for publication is DENIED. NO FURTHER FILINGS WILL BE ACCEPTED IN THIS CLOSED APPEAL. [4548401-01], [4543843-1], [4543843-2], [4544860-1] [01-17000] (sm)

2/20/03 Received late, Appellees Department of Mental Health and California Department of Correction's bill of costs, served on 2/19/03 [01-17000] (sm)

2/20/03 Filed order (Deputy Clerk: sm) Appellees' cost bill, served on 02/19/03 and received on 02/20/03 is DENIED as untimely. FRAP 39 (d) (1). Cir. R. 39-1.4. Mollura v Miller 621 F.

2d 334. [01-17000] (sm)

2/20/03 Filed order (Deputy Clerk:) [01-17000] (sm)

U.S. District Court

EASTERN DISTRICT OF CALIFORNIA
(Sacramento)

CIVIL DOCKET FOR CASE #: 99-CV-2530

Colbert v. Mental Health, et al

Filed: 12/22/99
Assigned to: Senior Judge Milton L Schwartz
Referred to: Magistrate Judge Peter A Nowinski
Demand: $0,000
Nature of Suit: 442
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in USDC N. Dist Oakland : is C99-5104 CW
Cause: 42:2000e Job Discrimination (Employment)

SONJA COLBERT	
plaintiff	Sonja N Colbert [COR LD NTC] [PRO SE] PO Box 31894
v.	Oakland, CA 94604 510-757-6072
DEPT OF MENTAL HEALTH defendant	Karen Kiyo Huster [COR LD NTC] Attorney General's Office of the State OF California PO Box 70550 Oakland, CA

94612- 0550
510-622-2201

CALIFORNIA DEPARTMENT OF	Karen Kiyo Huster
CORRECTIONS	(See above)
defendant	[COR LD NTC]

DOCKET PROCEEDINGS

DATE # DOCKET ENTRY

12/22/99 1 ORIGINAL file, certified copy of transfer order and docket sheet received from USDC Northern Dist CA Oakland C99-5104CW, assigned to Senior Judge Milton L. Schwartz referred to Magistrate Judge Peter A. Nowinski (ljr)
[Entry date 12/23/99]

12/22/99 2 ORDER requiring timely serv and joint status report by Magistrate Judge Peter A. Nowinski informing the parties on the procedure to follow in pursuing this action (ljr)
[Entry date 12/23/99]

12/29/99 3 ANSWER by defendant Dept of Mental Health, defendant CA Dept Corrections (rb)
[Entry date 12/30/99]

1/14/00 4 PROOF OF SERVICE by plaintiff Sonja N Colbert of [2-1], [3-1] (ljr) [Entry date 01/14/00]

1/14/00 5 PROOF OF SERVICE by plaintiff Sonja N Colbert of consent to proceed (ljr) [Entry date 01/14/00]

1/14/00 6 CONSENT to proceed before a Magistrate by plaintiff Sonja N Colbert (ljr) [Entry date 01/14/00]

1/14/00 7 JOING STATUS REPORT by plaintiff Sonja N Colbert (ljr)[Entry date 01/14/00]

2/17/00 8 JOINT STATUS REPORT by defendant (ch1) [Entry date 02/18/00]

3/8/00 -- RESERVICE of DOCUMENT(S) order re timely serv and joint status report [2-1] addressed to plaintiff Sonja N Colbert, defendant Dept of Mental Health, defendant CA Dept Corrections (ljr) [Entry date 03/08/00]

3/28/00 9 ORDER by Magistrate Judge Peter A. Nowinski I hereby refer pltf's case to the members of the court's Bradshaw panel with instructions to assess whether any member of the panel deems pltf's case meritorious and wishes to assume her representation; if a member of the Bradshaw panel agrees to take pltf's case I will grant her request for appointment of counsel; supplemental joint status report due 30 days from the date appointed counsel submits his or her substitution as atty of record (cc: all counsel) (ljr) [Entry date 03/28/00]

5/16/00 10 SCHEDULING ORDER Magistrate Judge Peter A. Nowinski pltf's designation of expert witnesses ddl 7/10/00 dft's ddl 8/7/00; discovery ddl set for 9/5/00; dispositive motion ddl 10/2/00; joint pretiral statement ddl 11/8/00; final pretrial conf 9:00 11/15/00 before the magistrate judge; Jury Trial 9:30 2/12/01 before Judge MLS (cc: all counsel) (ljr) [Entry date 05/16/00]

5/16/00 11 ORDER by Magistrate Judge Peter A. Nowinski ORDERING pltf's request for appointment of counsel DENIED [1-1] (cc: all counsel) (ljr) [Entry date 05/16/00]

10/2/00 12 NOTICE OF MOTION AND MOTION for summary judgment by defendants Motion Hearing SET for 9:00 11/8/00 (dc)[Entry date 10/03/00]

10/2/00 13 MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion for summary judgment [12-1] (dc)[Entry date 10/03/00]

10/2/00 14 STATEMENT by defendant of undisputed material facts in support of motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 15 DECLARATION of Efren C. Andres in support of dfts' motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 16 DECLARATION of V. Cisneros in support of dfts' motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 17 DECLARATION of Higino S. Fabricante in support of dfts' motion for summary judgment [12-1] (dc)
[Entry date 10/03/00]

10/2/00 18 DECLARATION of Duane Fidel in support of dfts' motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 19 DECLARATION of Robert L. Jordan in support of dfts' motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 20 DECLARATION of Karen Huster in support of dfts' motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 21 DECLARATION of Zenida Tan in support of dfts' motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 22 DECLARATION of Andre D. Masuret in support of dfts' motion for summary judgment [12-1] (dc) [Entry date 10/03/00]

10/2/00 23 NOTICE of lodging of original depo transcript by defendant regarding (dc) [Entry date 10/03/00]

10/2/00 24 PROOF OF SERVICE by defts of notice of motion for summary judgment and supporting documents; and copy of depo transcript of Sonja Colbert, dated 8/24/00, vol 1, pages 1-186 (dc) [Entry date 10/03/00]

10/2/00 25 NOTICE AND MOTIONS to compel responses to discovery, doc demands, requests for admission and interrogs by plaintiff Sonja N Colbert Motion Hearing NOT NOTICED (dc) [Entry date 10/03/00] [Edit date 09/20/01]

10/2/00 26 MOTION in limine by plaintiff Sonja N Colbert Motion Hearing NOT NOTICED (dc) [Entry date 10/03/00]

10/3/00 27 PROOF OF SERVICE by Leo Washington for plaintiff Sonja N Colbert of motion in limine and exhibits [26-1] (mll)[Entry date 10/04/00]

10/3/00 28 PROOF OF SERVICE by Leo Washington for plaintiff Sonja N Colbert of motion in limine upon Attorney Huster for dft CA Dept of Mentl Health and CDC [26-1] (mll) [Entry date 10/04/00]

10/3/00 29 PROOF OF SERVICE by Ralph Anderson for plaintiff Sonja N Colbert of pltf's motion to compel responses to interrogs, requests for production of document and tangible things, and requests for admission; points and authorities in

support; declaration of pltf in support; and proposed order of the court (dc)
[Entry date 10/04/00]

10/3/00 30 PROOF OF SERVICE by Ralph Anderson for plaintiff Sonja N Colbert of motions in limine and (8) exhibits (dc)
[Entry date 10/04/00]

10/13/00 31 RESPONSE by defendant to motion to compel responses to discovery, doc demands, requests for admission and by plaintiff Sonja N Colbert [25-1] (dc) [Entry date 10/16/00]

10/13/00 32 DECLARATION of Karen Huster in support of opposition to motions to compel [31-1] (dc) [Entry date 10/16/00]

10/20/00 33 ORDER by Magistrate Judge Gregory G. Hollows ORDERING 5/16/00 scheduling order [10-1] is VACATED; on or before

12/6/00 the parties shall file a joint pretrial statement; objections due within 20 days; pretrial conference set for 9:00 12/20/00 jury trial set for 9:30 3/12/01 before Judge Schwartz (cc: all counsel) (kh1) [Entry date 10/20/00]

10/25/00 34 RESPONSE by plaintiff Sonja N Colbert to motion for summary judgment by defendants [12-1]; points and authorities; proposed order; and declaration of pltf (dc)
[Entry date 10/26/00]

10/25/00 35 PROOF OF SERVICE by defendants Dept of Mental Health, and CA Dept Corrections of dfts' opposition to pltf's motions to compel responses to discovery (dc)
[Entry date 10/26/00]

10/25/00 36 PROOF OF SERVICE by defendants Dept of Mental Health, and CA Dept Corrections of declaration of Karen Kiyo Huster in support of opposition to motions to compel (dc)
[Entry date 10/26/00]

10/26/00 37 REQUEST by defendants Dept of Mental Health, and CA Dept Corrections for clarification of the court's 10/20/00 order (dc) [Entry date 10/27/00]

10/31/00 38 REPLY by defendants Dept of Mental Health and CA Dept Corrections to response to motion for summary judgment by defendants [12-1] (dc) [Entry date 11/01/00]

11/1/00 39 SEPARATE STATEMENT by plaintiff Sonja N Colbert of material facts in opposition to motion for summary judgment [12-1](mll) [Entry date 11/02/00]

11/1/00 40 PROOF OF SERVICE by plaintiff Sonja N Colbert of separate statement of material facts in opposition to motion for summary judgment [39-1] (mll) [Entry date 11/02/00]

11/6/00 41 LETTER re meet and confer to

court from plaintiff Sonja N Colbert (dc) [Entry date 11/07/00]

11/8/00 42 MINUTES of motion for summary judgment before Magistrate Judge Peter A. Nowinski by defendants [12-1]; motions submitted w/o oral argument; written order to be prepared by the court (dc) [Entry date 11/09/00]

12/5/00 43 ORDER by Magistrate Judge Peter A. Nowinski ORDERING that the 10/20/00 order [33-2] VACATED pending resolution of dts' motion for summary judgment (cc: all counsel) (as) [Entry date 12/05/00]

12/5/00 44 SEPARATE PRETRIAL STATEMENT from plaintiff (as) [Entry date 12/06/00]

12/7/00 46 ADDENDUM to witness list by plaintiff (as) [Entry date 12/08/00]

12/7/00 47 EXHIBIT No 80, a 90 minute tape by plaintiff (as) [Entry date 12/08/00]

12/7/00 48 PROOF OF SERVICE by plaintiff of [46-1] (as)[Entry date 12/08/00]

12/7/00 49 PROOF OF SERVICE by plaintiff of [44-1] (as)[Entry date 12/08/00]

12/8/00 45 COPY OF LETTER to Attorney Huster from plaintiff re joint pretrial statement and separate pretrial statement; pltf Colbert have been

unsuccessful to reach attorney Huster by phone (as) [Entry date 12/08/00]

12/11/00 50 REQUEST for reconsideration of the district court's order by plaintiff Sonja N Colbert Motion Hearing Set for 1/10/01 9:00am (ndd) [Entry date 12/12/00]

12/11/00 51 NOTICE of Motion of Request for reconsideration of district court's new order [50-1] (ndd) [Entry date 12/12/00]

12/11/00 52 DECLARATION of Sonja Colbert in support of Request for reconsideration of the district court's new order [50-1]
(ndd) [Entry date 12/12/00]

12/11/00 53 PROOF OF SERVICE by plaintiff Sonja N Colbert of [52-1],[51-1], [50-1] (ndd) [Entry date 12/12/00]

12/15/00 54 RESPONSE by dfts Sonja N Colbert, Dept of Mental Health to motion for reconsideration of the district court's order by plaintiff Sonja N Colbert [50-1] (hk) [Entry date 12/18/00]

12/15/00 55 DECLARATION of Lisa A Williams in support of response to motion for reconsideration [54-1] (hk) [Entry date 12/18/00]

12/26/00 56 REPLY BRIEF by plaintiff Sonja N Colbert to dft's opposition to motion for

reconsideration of the district court's order [50-1] (ea) [Entry date 12/27/00]

12/27/00 57 PROOF OF SERVICE by plaintiff of [56-1] (as)[Entry date 12/28/00]

1/10/01 58 MINUTES of hrg on motion before Magistrate Judge Peter A. Nowinski motion for reconsideration of the district court's order by plaintiff Sonja N Colbert [50-1] SUBMITTED; C/R tape 1 of 1 (hk) [Entry date 01/11/01]

1/19/01 59 FINDINGS AND RECOMMENDATIONS by Magistrate Judge Peter A. Nowinski RECOMMENDING that dfts' motion for summary judgment should be granted; motion for summary judgment by defendants [12-1] REFERRED BACK to Senior Judge Milton L.Schwartz (cc: all counsel) (ndd) [Entry date 01/19/01]

1/26/01 60 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [59-1] by plaintiff Sonja N Colbert (ndd) [Entry date 01/29/01]

1/26/01 61 PROOF OF SERVICE by plaintiff Sonja N Colbert of [60-1](ndd) [Entry date 01/29/01]

1/26/01 62 PROOF OF SERVICE by plaintiff Sonja N Colbert of [60-1](ndd) [Entry date 01/29/01]

1/29/01 63 PROOF OF SERVICE by plaintiff Sonja N Colbert of objections to Magistrate's F&R and supporting papers [60-1] (ea) [Entry date 01/30/01]

2/5/01 64 OPPOSITION by defendants to plt's Objection to magistrate judge's findings and recommendations re dfts' motion for summary judgment [60-1] (ndd) [Entry date 02/06/01]

2/5/01 65 DECLARATION of Lisa A Williams in support of dfts' Opposition to plts' objection to magistrate judge's findings and recommendations re dfts' motion for summary judgment[64-1] (ndd) [Entry date 02/06/01]

2/5/01 66 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [59-1] by plaintiff Sonja N Colbert (hk) [Entry date 02/06/01]

2/7/01 67 REPLY by plaintiff Sonja N Colbert to opposition [64-1] (hk)[Entry date 02/08/01]

2/8/01 68 PROOF OF SERVICE by plaintiff Sonja N Colbert of [67-1](ndd) [Entry date 02/09/01]

2/16/01 69 ORDER by Magistrate Judge Peter A. Nowinski ORDERING reply [67-1] STRICKEN striking (cc: all counsel) (hk)
[Entry date 02/16/01]

2/22/01 70 LETTER to court from counsel for

plaintiff regarding findings and recommendations [59-1] (as)[Entry date 02/23/01]

2/22/01 71 APPLICATION by plaintiff for retention of file by district judge (as) [Entry date 02/23/01]

2/22/01 72 AMENDED OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [59-1]by plaintiff; and request for reconsideration by district court judge (as) [Entry date 02/23/01]

2/23/01 73 OBJECTIONS by plaintiff Sonja N Colbert to Report and Recommendation [59-1] (dcap) [Entry date 02/26/01]

2/27/01 74 NOTICE: from C Lydon trial of 3/12/01 is VACATED to be reset at a later date (ndd) [Entry date 02/28/01]

2/28/01 75 REPLY (OPPOSITION) by Dept of Mental Health, CA Dept Corrections to plft's obj to order striking reply;
reconsideration request; and appl for retention of file by DJ [72-1] (ea) [Entry date 03/01/01]

3/5/01 76 REPLY BRIEF by plt Sonja N Colbert to dfts' Opposition re plt's objection to order striking reply brief to dfts
opposition re plt's objections to magistrate judge's findings and recommendation [75-1], Reconsideration Request and Application for retention of file by district judge (ndd)

[Entry date 03/06/01]

3/5/01 77 PROOF OF SERVICE by plaintiff Sonja N Colbert of [76-1](ndd) [Entry date 03/06/01]

8/28/01 78 REQUEST by plaintiff Sonja N Colbert in regards to when the court's determinations on the pending motions take place; when will trial be reset; and what action can be taken to move the case along (mdp) [Entry date 08/29/01][Edit date 08/30/01]

9/21/01 79 ORDER by Senior Judge Milton L. Schwartz ORDERING the magistrate judge's decision to strike from the record plft's reply filed 2/7/01 is [69-2] REVERSED; findings & recommendation order filed 1/19/01 [59-1] ADOPTED in full; motion for summary judgment by defendants [12-1] GRANTED case TERMINATED (cc: all counsel) (ea) [Entry date 09/24/01] [Edit date 09/25/01]

9/21/01 80 JUDGMENT entered pursuant to court order issued this date by Senior Judge Milton L. Schwartz (cc: all counsel) (ea)[Entry date 09/24/01]

9/28/01 81 NOTICE OF APPEAL by plaintiff Sonja N Colbert from District Court decision re judgment [80-1] (fee status not paid) (pc)[Entry date 10/01/01]

9/28/01 82 NOTICE of unsupported finding or conclusion of entering the motion for summary judgment for dfts and dismissal of complaint by plaintiff Sonja N Colbert (pc)
[Entry date 10/01/01]

9/28/01 83 STATEMENT by plaintiff Sonja N Colbert of issues on appeal(pc) [Entry date 10/01/01]

9/28/01 84 THE RECORD ON APPEAL by plaintiff Sonja N Colbert; request for the case file to be forwarded to the 9th circuit (pc)[Entry date 10/01/01]

9/28/01 85 APPEAL TRANSCRIPT by plaintiff Sonja N Colbert [pc)[Entry date 10/01/01]

9/28/01 86 TRANSCRIPT DESIGNATION and Ordering Form: no transcripts will be ordered re appeal [81-1] (pc) [Entry date 10/01/01]

9/28/01 87 PROOF OF SERVICE by plaintiff Sonja N Colbert of [81-1],[82-1], [83-1], [84-1], [85-1], [86-1] (pc)
[Entry date 10/01/01]

10/4/01 88 MAILED case information/docket fee payment notice, copy of Notice of Appeal and appealed 9/21/01 judgment [80-1] to 9th Circuit Court of Appeals, copy of appeal and docket sheet to all parties (pc) [Entry date 10/04/01]

10/4/01 89 CERTIFICATE OF RECORD transmitted to 9th Circuit [81-1](notice sent) (pc) [Entry date 10/04/01]

10/4/01 90 RECEIPT of appeal fee for $105 for plaintiff by Sonja Colbert Receipt # 1808 (ak) [Entry date 10/05/01]

10/4/01 91 SUPPLEMENTAL STATEMENT of issues presented on appeal by plaintiff (ak) [Entry date 10/05/01]

10/4/01 92 PROOF OF SERVICE by plaintiff of [91-1] (ak)
[Entry date 10/05/01]

10/16/01 -- NOTIFICATION by 9th Circuit of Appellate Docket Number 01-17000 (pw) [Entry date 10/17/01]

10/22/01 -- REMARK forward copies of documents #90, 91, 92 and certified docket sheet to the USCA re appeal #01-17000 (ljr)[Entry date 10/22/01]

11/7/01 93 NOTICE by defendants of change of address for Karen Kiyo Huster to Dept of Justice Office of the Attorney General PO Box 70550 Oakland CA 94612-0550 (mdk) [Entry date 11/08/01]

5/17/02 -- CLERK'S record on appeal transmitted to 9th Circuit: case file 3 volumes; 3

expandos of transcripts; and copy of docket mailed to 9th Circuit regarding appeal [81-1] (daw)
[Entry date 05/17/02]

5/28/02 -- RETURNED Receipt from 9th Circuit regarding clerk's record on appeal (pw)
[Entry date 10/09/02]

3/3/03 94 CERTIFIED COPY of judgment from 9th Circuit the decision of the District Court [81-1] is AFFIRMED (mdk)
[Entry date 03/04/03]

Case Flags:
TERMED

END OF DOCKET: 2:99cv2530

Title VII and Sexual Harassment Claims

INTENDED PURPOSE

Title VII of the *Civil Rights Act of 1964* (42 U.S.C. §§2000e et seq.) prohibits covered employers from discriminating based on:

1) Race;
2) Color;
3) Sex;
4) Religion; and
5) National Origin

Title VII"s prohibition against sexual discrimination includes both sexual harassment and pregnancy discrimination. The term "discriminate" means to make a distinction, or to treat persons differently based on their race, color, national origin, sex, or religion. The pertinent statute makes it an unlawful employment practice for a covered employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" based on race, color, sex, religion, or national origin. 42 U.S.C. §§2000e-2(a)(1). It is also unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" based on race, color, sex, religion, or national origin. 42 U.S.C. §§2000e-2(a)(2). Like most other laws

prohibiting employment discrimination, Title VII also prohibits retaliation. 42 U.S.C. §§2000e-3 contains the specific statutory language prohibiting retaliation against those who oppose discrimination or who participate in a Title VII process.

Typically, the charging party in a Title VII claim will be a member of a protected group, who claims to be aggrieved as a result of an adverse employment decision or practice. The allegation will be that an employer, covered by Title VII, has made an employment decision based on prohibited stereotypical or biased thinking about the employee"s membership in one of the five (5) groups protected by Title VII. Since the protections provided by Title VII are statutory in nature, an understanding of the underlying statutory framework is necessary.

FORMS OF DISCRIMINATION

Discrimination may take one of several forms. The most common forms of discrimination can be described as disparate treatment, disparate impact, mixed motive discrimination, retaliation, and the creation of a hostile work environment.

DISPARATE TREATMENT

Disparate treatment is intentional discrimination. Where employment decisions are motivated by race, color, sex, etc., disparate treatment exists. The key element needed to show disparate treatment is that members of a protected group are treated differently from non-members. A "but for" test is often applied. "But for" membership in a protected group, the employee would not have been the object of the

adverse employment action. With disparate treatment, the motivating factor behind the employment action is the employee"s membership in the protected group.

DISPARATE IMPACT

Discrimination can also occur as the result of the disparate impact of a neutral employment rule. For example, an employer may require a high school diploma for employment in a specified geographic area where the effect of the diploma requirement is to exclude minorities from employment at a rate greater than the rate at which non-minorities are excluded. Such employment requirements will typically only be upheld where it can be established that the requirement at issue is necessary for the particular job. Another example would be to create a job requirement that all employees must be able to lift some minimal amount of weight. An employment requirement of this nature might very well exclude females from consideration for employment at a rate greater than males. This employment requirement would only be upheld if the ability to lift the minimum amount of weight was a necessary element of the job, and some reasonable accommodation was not available.

MIXED MOTIVE

Mixed motive discrimination occurs where membership in the protected group is shown, by the employee, to have been "a reason" for the employment action being challenged, if not the sole reason. Cases in which mixed motive discrimination is at issue can be defended where the employer

shows that the same employment decision would have been made without regard to the employee"s membership in a protected group. In other words, cases in which mixed motive discrimination is at issue can be defended where there was some legitimate non-discriminatory reason, which was the prevailing or predominant reason for the challenged employment action. Mixed motive discrimination is defined and considered at 42 U. S. C. §§2000e-5(g). ***See also, Foster v. University of Arkansas***, 938 F.2d 111, 114 (7th Cir. 1991) where it was held that to establish Title VII liability under a mixed motive theory, the plaintiff must show that a protected status, such as race, played a motivating factor in the adverse employment decision at issue. If the plaintiff makes a showing that race or some other protected status played a motivating part in the adverse employment decision, the defendant (employer) may avoid liability only by showing that the same employment decision would have been made even if the protected status, i.e., race, had not been considered. This may be done by introducing evidence of the employer"s probable decision in the absence of an illegitimate motive.

Where membership in a protected group is shown to have been "a cause" for the employment action being challenged, the issue of liability under Title VII, but not damages, is established. Despite the finding of liability in mixed motive cases, a defense can still be mounted on the issue of damages. Compensatory damages are not available in "mixed motive" cases where the employer shows that the

same employment result would have occurred even without the protected status of the employee. To establish this defense, the employer must show that even with the alleged discrimination based on the employee"s membership in a protected group, the same employment action would have taken place because of a valid, non-discriminatory reason. Although compensatory damages are not available in a mixed motive case, an award of attorney"s fees may still be granted where the employee can show that some form of unlawful discrimination was "a cause" for the employment action.

HOSTILE WORK ENVIRONMENT

A hostile work environment occurs when unwelcome conduct unreasonably interferes with an employee"s work performance or creates an intimidating work environment regardless of whether the conduct is directly tied to a job benefit or detriment. In order to establish a prima facie case of a hostile work environment, an employee must show that:

6) He belongs to a protected group;
7) He was subject to unwelcome harassment;
8) The harassment was based on his membership in a protected group;
9) The harassment was sufficiently pervasive to affect a term, condition, or privilege of employment; and
10) The employer knew or should have known about the harassment but failed to take prompt, corrective action.

While hostile work environment cases are most often based on allegations of sexual harassment, similar principles are applicable for analyzing discrimination based on race, national origin, or religion. ***Meritor Savings Bank v. Vinson***, 477 U.S. 57, 106 S.Ct. 2399 (1986).

RETALIATION

To prove retaliation, it must be shown that:

1) The employee engaged in an activity protected by Title VII;
2) The employer imposed upon the employee some adverse employment action; and
3) The employer imposed the adverse employment action because the plaintiff engaged in conduct protected by Title VII.

The pertinent code section is 42 U.S.C. §§2000e-3(a). Title VII prohibits retaliation against a current employee, an applicant, or a former employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, or because he has opposed any practice made an unlawful practice by Title VII." ***Hazen Paper Co. v. Biggins***, ___ U.S. ___ 113 S.Ct. 1701, 1706 (1993). See also, ***Donnellon v. Fruehauf Corp.***, 794 F.2d 598, 601 (11th Cir. 1986) for the proposition that a plaintiff, who is relying on retaliation, must set forth a prima facie case. To establish a prima facie case of retaliation, the plaintiff must show:

1) That he was engaged in a statutorily

protected activity;
2) That the employer has taken an adverse employment action; and
3) That a causal connection exists between his participation in a statutorily protected activity in the adverse employment action taken by the employer.

To rebut a prima facie case of retaliation, the employer must show a legitimate non-discriminatory reason for the adverse employment action. Where the employer carries its burden of production, the court must then inquire as to whether or not the stated reason for the adverse employment action was a mere pretext.

COVERED EMPLOYER

For the purpose of Title VII a "covered employer" is defined as a person, or legal entity, engaged in an industry affecting "commerce," who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §§2000e(a). Labor unions and employment agencies are also subject to Title VII, as are local, state and municipal governments.

General agency principles are applied in deciding whether or not an employer has fifteen (15) or more employees. For example, courts consider whether or not the employer controls the time, method, and manner of work. If so, an employment relationship is typically found. If not, an independent contractor may exist. Independent contractors are not

"employees" within the meaning of Title VII. With regard to part time employees, regular part time employees are considered "employees" under Title VII. Temporary part time employees are not considered "employees."

To reach the fifteen (15) employee minimum, separate entities, including corporations, can be aggregated under certain circumstances. For example, where there is common ownership, common control, shared facilities, shared employees, shared managers, central control of labor relationships, etc., separate employees may be aggregated for the purpose of reaching the fifteen (15) employee level.

SUCCESSOR LIABILITY

Successor liability may occur where one covered employer, such as a corporation, purchases another covered employer, against whom a Title VII claim has been made. There is, however, typically a requirement that the person or entity making the purchase have knowledge of the pending EEOC claim. In addition, if, by the purchase agreement, the successor covered employer agrees to assume the debts and liabilities of the entity being purchased, there may be successor liability under Title VII. A straight asset purchase without the assumption of liabilities and contingencies will typically not result in successor liability.

INDIVIDUAL LIABILITY

While a supervisor is considered an "employer" under Title VII for the purpose of creating liability,

there is no individual liability for the purpose of paying damages. As a consequence, a supervisor may be the cause of an employer"s liability under Title VII but will not be liable to pay damages, individually, to the aggrieved employee.

PROCEDURE

When an employee believes he or she has been the subject of unlawful discrimination under Title VII, a charge of discrimination must be filed with EEOC within one hundred and eighty (180) days of the alleged discriminatory act. Typically, a written charge of discrimination is required. In fact, the EEOC supplies a form, which is most often used.

CONCILIATION INVESTIGATION

Once a charge of discrimination has been filed, EEOC has one hundred and eighty (180) days to conduct an administrative investigation and to return its findings. EEOC findings are based on "reasonable" cause. Typically, EEOC will find:

1) Evidence of discrimination;
2) No evidence of discrimination; or
3) Return a finding that it has not had sufficient time to investigate the claim.

RIGHT TO SUE NOTICE

Where the EEOC has not otherwise issued a Right to Sue notice after one hundred and eighty (180) days, the charging party/employee is entitled to demand and receive a Right to Sue notice from EEOC. The EEOC will issue a Right to Sue notice whether or not there is a corresponding finding that

evidence of discrimination exists. The charging party is then entitled to file suit in the appropriate United States District Court unless EEOC has decided to bring an action in its own name.

Once a Right to Sue notice has been received, the charging party/employee has ninety (90) days in which to bring an action in the appropriate United States District Court. This ninety (90) days begins to run from the actual receipt of the Right to Sue notice. This ninety-day filing requirement acts as a statute of limitations where a complaint is not filed in a timely fashion.

DISPARATE TREATMENT AND HOSTILE WORK ENVIRONMENT

To discriminate against an employee means to treat the employee differently as far as the terms and conditions of his employment. This can range from disparate treatment to the creation of a hostile work environment based on race, color, sex, religion, or national origin. The test is whether or not the employer has applied different standards of treatment to similarly qualified persons, who are not within the protected group. For example, where racial discrimination is alleged by a black applicant or employee, the issue will be whether or not the employer has applied the same, or different, employment standards to white applicants or employees.

EVIDENCE OF DISCRIMINATION

Direct evidence can be relied upon to show discrimination. In the absence of direct evidence,

circumstantial evidence is appropriate. To establish a cause of action for disparate treatment based upon circumstantial proof, the charging party must show:

1) That he was a member of a group protected by Title VII;
2) That he was qualified for his position, or for a position for which he was applying;
3) That he suffered an adverse employment action; and
4) That applicants or employees, who were not a member of his protected group, were treated differently by the employer.

These principles were established in a decision by the United States Supreme Court in ***McDonnell Douglas v. Green***, 411 U. S. 792, 802, 93 S.Ct. 1817 (1973). Once the above elements have been established, a prima facie case (or an inference of) discrimination exists. It is then up to the employer to present evidence of a legitimate reason for the adverse employment action. This is a burden of production, and not a burden of proof. At all times, the burden of proof remains upon the charging employee. If the employer satisfies its burden of production, and shows that the adverse employment action was based on a legitimate, non-discriminatory reason, the charging employee must then show that the employer"s stated non-discriminatory reason for the employment action was a mere pretext.

To prove disparate treatment under Title VII, the

employee must show that the employer acted with discriminatory purpose. Where direct evidence is not available, the three-step procedure set forth in ***McDonnell Douglas Corp. v. Green*** is available. The ultimate question in a disparate treatment case is not whether the employee established a prima facie case or demonstrated pretext, but whether the employee can prove by a preponderance of the evidence that the employer intentionally discriminated against him. A showing of pretext by the employee, without, more will not support a finding of discrimination or a judgment. Likewise, a simple finding of the employer did not rely on its proffered reason for the adverse employment action will not suffice to establish Title VII liability without a further showing that the employer relied upon the employee"s membership in a protected group in making its decision. What all of this means is that a mere showing of pretext by the employee is not sufficient to obtain summary judgment. Instead, the employer is still entitled to a jury trial on the ultimate issue . . . whether or not there was intentional discrimination.

MISCONDUCT

A plaintiff fired for misconduct makes out a prima facie case for a discriminatory discharge if he shows that:

1) He is a member of a protected class;
2) That he was qualified for the job from which he was fired; and
3) That the misconduct for which he was discharged was nearly identical to that

engaged in by an employee outside the protected class whom the employer retained.

Nix v. WLYC Radio/Rahall Communications, 738 F.2d 1181, 1184 (11th Cir. 1984).

As with other disparate treatment cases, once an employee has established a prima facie case of a discriminatory discharge, the burden of production shifts to the employer to produce evidence of a valid, non-discriminatory reason for the discharge. As was stated earlier, this is a burden of production and not a burden of proof. At all times, the ultimate burden of proof that the employer discriminated against the employee remains with the employee. Assuming the employer carries its burden of production, the presumption of a discriminatory discharge raised by the prima facie case is rebutted. The employee must then establish, by a preponderance of the evidence, that the employer"s stated non-discriminatory reason for his discharge was a mere pretext. Otherwise, summary judgment may be appropriate for the employer.

REMEDIES

Several remedies are available under Title VII. Available remedies are:

1) Injunctive relief;
2) Reinstatement;
3) Back pay;
4) Front pay;
5) Compensatory damages;
6) Punitive damages; and

7) Attorney"s fees.

Compensatory damages and punitive damages are only available in cases of disparate treatment where intentional discrimination is shown. The only remedies available in disparate impact cases are injunctive relief, reinstatement, back pay, front pay, and attorney"s fees. Where reinstatement is ordered, front pay is not available. To recover attorney"s fees, the employee must prevail.

STATUTORY CAPS

Statutory caps limits exists for combined awards of front pay, punitive damages, and compensatory damages. The caps are based upon the number of employees employed by the employer against whom the charge of discrimination has been made. The caps are as follows:

1) For more than fourteen (14) and less than one hundred and one (101) employees in each of twenty (20) or more calendar weeks in the current or preceding year the cap is $50,000;
2) For more than one hundred (100) but fewer than two hundred and one (201) employees, the cap is $100,000;
3) For more than two hundred (200) employees but fewer than five hundred and one (501) employees, the cap is $200,000; and
4) For an employer with more than five hundred (500) employees, the cap is $300,000.

Separate corporate entities or employers, may be

combined for the purpose of determining which of the above caps is appropriate. Some of the factors to be considered are:

1) Common ownership;
2) Common control;
3) Shared facilities;
4) Shared employees;
5) Shared managers; and
6) Central control of labor relations.

Section II

TITLE VII - SEXUAL HARASSMENT

SEXUAL HARASSMENT

While specifically not mentioned in Title VII, sexual harassment can constitute sexual discrimination and violates Title VII. In the employment context, sexual harassment refers to unwelcome sexual advances imposed upon an employee by someone of authority. Such unwanted sexual advances may come in the form of sexual jokes, repeated offensive comments or looks, intentional body contact, indecent propositions, or forced sexual relations. Historically, sexual harassment claims were brought by way of a state cause of action for the intentional infliction of emotional distress or some related tort. This changed, however, in 1986 with the Supreme Court"s decision in ***Meritor Savings Bank v. Vincent***, where in the U. S. Supreme Court held that sexual harassment claims could be brought under Title VII as a form of discrimination based on sex. In its decision, the Supreme Court

adopted earlier EEOC guidelines which had placed sexual harassment within the various types of activity prohibited in the workplace. Those types of activity included "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." The EEOC guidelines provided that prohibited forms of sexual misconduct could constitute "sexual harassment, whether or not it is directly limited to the grant or denial of an economic ***quid pro quo*** where such conduct has the purpose or effect of unreasonably interfering with an individual"s work performance or creating an intimidating, hostile, or offensive work environment. ***Meritor Savings Bank v. Vincent***, 477 U. S. 57, 65, 106 S.Ct. 2399 (1986).

In the Supreme Court"s view, the issue was whether or not the alleged misconduct was "unwelcome." Thus, if an improper and welcomed sexual advance was made, and the victim voluntarily responded to it and engaged in some sexual conduct, the employer could still be liable for the unwelcome initial conduct. In other words, the employee"s voluntary participation in the ultimate or sexual relationship did not bar a cause of action so long as the initial conduct had been unwelcome.

Sexual harassment claims typically fall into one of two categories; ***quid pro quo***, or hostile work environment. ***quid pro quo*** harassment occurs when an employee or prospective employee is forced to choose between an employment detriment and submitting to sexual demands. To establish a prima facie case of ***quid pro quo*** sexual harassment, the

plaintiff must show:

7) That she is a member of a protected class;
8) That she was the subject of unwelcome sexual harassment in the form of sexual advances or a request for sexual favors;
9) That the unwelcome harassment or advance was based on sex;
10) That submission to the unwelcome advance was an express or implied condition for receiving job benefits or that the refusal to submit to a supervisor"s sexual demands resulted in a tangible job detriment; and
11) That the employer was responsible for the supervisor"s conduct.

Sexual harassment occurs when unwelcome conduct of a sexual nature unreasonably interferes with an employee"s work performance or creates an intimidating work environment, regardless of whether the conduct is directly tied to a job benefit or detriment. In order to establish a prima facie case, an employee must prove:

1) That she belongs to a protected group;

2) That she was the subject of unwelcome sexual harassment;

3) That the harassment was based on sex;

4) That the harassment was sufficiently pervasive to effect a term, condition, or privilege of employment; and

5) That the employer knew, or should have known, about the harassment and failed to take prompt, corrective action.

Questions to be asked in sexual harassment claims are:

1) Was the verbal or physical conduct of a sexual nature;
2) If so, was it unwelcome; and
3) Was there a ***quid pro quo*** for the sexual conduct and/or a hostile work environment.

EEOC guidelines prohibit conduct constituting:

1) Sexual advances;
2) Request for sexual favors;
3) Any verbal conduct of a sexual nature;
4) Any physical conduct of a sexual nature;
5) Written or visual sexual conduct; and
6) Vulgar, crude and sexist language.

In determining whether or not the alleged misconduct was so pervasive as to create a hostile work environment a two-tiered standard is applied. First, whether or not the alleged misconduct would have been offensive to the average reasonable woman, and second, whether the alleged misconduct was, in fact, offensive to the charging party.